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No. 75-354

IN THE

Supreme Court of the United States

October Term, 1975

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 5, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner The First Boston Corporation respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 11, 1975.

Opinions Below

The opinion of the Court of Appeals on liability (A1-124)[1] is reported at 480 F.2d 341, and its subsequent opinion on damages (B1-42) is reported at 516 F.2d 172.

[1] The opinions below are reproduced in a separate volume of Joint Appendices A through E submitted with this petition and the petitions of other defendants, and "A", "B", "C", "D" and "E" page references are to that volume.

The opinion of the District Court on liability (A125-162) is reported at 337 F. Supp. 1128, and its opinion on damages (B43-87) is reported at 384 F. Supp. 507.

Prior opinions of the Court of Appeals (C1-31) and the District Court (C32-48) with respect to an application for a preliminary injunction are reported at 426 F.2d 569 and 303 F. Supp. 191, respectively. The opinions of the District Court in the related cases of *SEC* v. *Bangor Punta Corporation* (D1-21) and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (D22-34) are reported at 331 F.Supp. 1154 and 337 F. Supp. 1147, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (E1-2), and a timely petition for rehearing was denied on June 9, 1975 (E 4, 8). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Plaintiff, a contestant for control of a corporation, has recovered damages for loss of the contest from the underwriter of a competing exchange offer registered under the Securities Act of 1933, on the claim that an omission in the registration statement was misleading to those who acceped the offer. Plaintiff was not a purchaser of the offered securities.

1. May a contestant for corporate control recover damages from the underwriter of a rival exchange offer under Section 14(e) of the Securities Exchange Act of 1934 on the ground that the underwriter did not discharge

its duty of due diligence under Section 11 of the Securities Act of 1933, even though Section 14(e) has no express provision for civil liability and Section 11 expressly confines the underwriter's liability to purchasers of the offered securities?

2. If so, may the underwriter be held liable for damages (a) far in excess of the limitation on damages expressly prescribed for underwriters by Section 11, and (b) jointly and severally with other defendants held to have committed additional and separate violations of the 1934 Act?

Statutes Involved

Section 14(e) of the Securities Exchange Act of 1934, 82 Stat. 457, as amended, 84 Stat. 1497, 15 U.S.C. § 78n(e), and relevant provisions of Section 11 of the Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U.S.C. § 77k, are set forth as an addendum to this petition.

Statement of the Case

This case arises out of a contest between Chris-Craft Industries, Inc. ("Chris-Craft") and Bangor Punta Corporation ("Bangor Punta") for control of Piper Aircraft Corporation ("Piper"). Bangor Punta was the apparent victor, acquiring about 51% of Piper's shares, including about 7% through an exchange offer of its own securities for stock of Piper (A131, D3). First Boston acted as dealer-manager for Bangor Punta's exchange offer, registered under the Securities Act of 1933, for which it received a fee of $40,000.

This action, brought by Chris-Craft against Bangor Punta, First Boston and others,[2] and related actions, brought by Bangor Punta and the SEC, were tried concurrently. The District Court dismissed all the claims of each of the contestants (A125-162, D22-34), but held that the SEC was entitled to equitable relief against Bangor Punta (D1-21) because the registration statement on the exchange offer had omitted mention of a material fact (D12-15).[3]

Although the District Court found no "improper purpose" or "bad faith" in the omission, it held (a holding not contested by this petition) that good faith was not a defense to an action by the SEC seeking equitable relief. The court ordered Bangor Punta to make a rescission offer to the Piper shareholders who had accepted the exchange offer (D16).[4]

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[2] Jurisdiction was based on 28 U.S.C. § 1331(a), 15 U.S.C. § 78aa, and 15 U.S.C. § 77v.

[3] The omission was that Bangor Punta had received and considered an offer to purchase one of its assets (the Bangor and Aroostook Railroad, known as the "BAR") for $5,000,000, which was $13,000,000 less than its carrying value on Bangor Punta's books (D12-15). In fact, upon announcement of the sale three months after the registration statement became effective, in a much less advantageous form from a tax standpoint than had earlier been considered, the market price of Bangor Punta stock went up. (Printed Appendix in the Court of Appeals, vol. 2, at 591a.)

[4] The relief granted by the District Court was directed solely to vindication of the public policy embodied in the securities laws, and not to redress of any economic loss suffered by the tendering shareholders, since none existed (D16).

Chris-Craft was denied relief on all of its claims (A161) on the ground that it had failed to establish the essential elements of a claim for damages under the Securities Exchange Act of 1934, including scienter and causation (A144). The court further said with respect to First Boston that, even had the record supported the claims against the other defendants, "the Court would be hard put to find any basis for extending liability to the First Boston defendants," who had "acted solely" in "good faith" (A158-159).

On appeal, the Court of Appeals set aside none of the District Court's findings (A7 & n. 1), but held that Chris-Craft, although not a purchaser of any Bangor Punta securities, was a "victim" of the alleged violations of Section 14(e) of the 1934 Act. The court said that because Chris-Craft "got less stock than it needed for control" of Piper, it had, without any proof of causation in fact, "a right of action for damages against all defendants" (A31-33).

First Boston, the Court of Appeals held, was liable to Chris-Craft under Section 14(e) of the 1934 Act because it "did not adequately perform its duty" to make a "reasonable investigation" as an underwriter under Section 11 of the Securities Act of 1933 (A51). The court repeatedly referred to First Boston as an "underwriter" (A48-51), a term that appears nowhere in the 1934 Act, without making any analysis of how First Boston's duty, if any, under the 1934 Act to Chris-Craft or others who were not purchasers of the registered securities differed in kind or degree from its duty to purchasers under the 1933 Act.

The Court of Appeals also held the other defendants liable for separate and additional violations of Sections 10(b) and 14(e) of the 1934 Act involving allegedly improper cash purchases of Piper shares by Bangor Punta and allegedly misleading statements to shareholders by members of the Piper family (A37-43, 63-67). Although First Boston was not held responsible for either of these violations, the court directed entry of a judgment "assessing damages against all defendants jointly and severally" (A69). Damages were to be measured, again without proof of cause and effect, by "the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position, and thus being able to compel a merger at any time" (A69).[5]

On remand, the District Court found that "the reduction in the appraisal value" of Chris-Craft's shareholding in Piper was "generously valued" at $2.40 per share, or a total of $1,673,988 (B70). The court also allowed Chris-Craft prejudgment interest on that amount (B76-79).

On further appeal by Chris-Craft, the Court of Appeals again reversed, saying that by "reduction in appraisal value" it meant the difference between what Chris-Craft had paid for its Piper shares ($64 per share) (B25) and

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[5] The Court of Appeals also granted injunctive relief against Bangor Punta precluding it from voting its "illegally" obtained shares for five years, and affirmed the dismissal of Bangor Punta's claims against Chris-Craft and the grant of equitable relief to the SEC, with modifications not relevant to this petition. Petitions for certiorari were denied, 414 U.S. 910.

the price at which, had it wished to do so, it could have sold its shares five months after Bangor Punta had acquired control (B28-31). There had been a drastic general decline in the securities markets during this five-month period, and the court fixed the hypothetical sales price at $27 per share (B29-31).

On this basis, the court awarded Chris-Craft damages of $25,793,365 (B31). It also "affirmed" the District Court on the award of prejudgment interest (B32-34). The total award of damages against First Boston, jointly and severally, is thus over $35,000,000, or more than four times the limitation on its liability as an underwriter expressly prescribed by Section 11 of the 1933 Act, i.e., the total price of the registered securities, about $8,000,000.

First Boston petitioned for rehearing or rehearing in banc, questioning the court's measure of damages and particularly its holding First Boston liable jointly and severally for an amount far in excess of the Section 11 limitation. The SEC, which had filed *amicus curiae* briefs supporting Chris-Craft's positions on various points throughout this litigation, supported First Boston's position with respect to the damage limitation of Section 11 and also urged the court to consider carefully the appropriateness of joint and several liability.

Rehearing was denied on June 9, 1975, the day this Court announced its decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 95 S. Ct. 1917.

Reasons for Granting the Writ

The decision below—holding that a violation of Section 11 of the 1933 Act gives rise to an *implied* right of action under Section 14(e) of the 1934 Act in favor of persons, and for an amount, beyond the *express* limitations on liability fixed by Section 11—is contrary to principles enunciated by this Court and raises issues of public importance.

I.

As the SEC stated to the Court of Appeals in its memorandum *amicus curiae* in support of First Boston's petition for rehearing, the questions raised by the damage award against First Boston may have "a wide-ranging impact upon the investment banking industry, upon the nation's economy and upon the enforcement of the federal securities laws by the Commission as well as by private parties."

In holding against First Boston, the Court of Appeals expanded the duty of due diligence of an underwriter far beyond the bounds set by Congress in Section 11 of the 1933 Act and imposed upon an underwriter, for the first time since passage of the Act, liability in favor of a party which never purchased the registered security and liability for damages exceeding the maximum permitted by Section 11.

The court also necessarily determined a question corresponding to that expressly reserved by this Court in *Blue Chip Stamps* v. *Manor Drug Stores, supra* at 1933 n. 15: whether an implied action under the 1934 Act "will lie for actions made a violation of the 1933 Act and the subject of express civil remedies under the 1933 Act."

The issues determined below will come before the courts on a recurring basis, since virtually all contests for

corporate control involve litigation by the contestants against one another and their respective officers, investment bankers and other advisors. It is noteworthy in this connection that Congress in passing the Williams Act, which added Section 14(e) to the 1934 Act, did not intend to create a legal regime that would "discourage takeover bids." *Rondeau* v. *Mosinee Paper Corp.*, 95 S. Ct. 2069, 2076.

It is important to the public interest in properly functioning capital markets and to the administration of the securities laws as a whole that the Court consider and determine the questions presented.

II.

First Boston was held liable for a failure properly to perform the duty imposed upon it as an underwriter by Section 11 of the 1933 Act. But "§ 11(a) of the 1933 Act confines the cause of action it grants to 'any person acquiring the security' " (*Blue Chip Stamps* v. *Manor Drug Stores, supra* at 1925) and Chris-Craft acquired no securities underwritten by First Boston.

The result reached below as to First Boston is thus directly contrary to this Court's reasoning in *Blue Chip Stamps, supra* at 1925-26, where it said, "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action."

The present case differs (insofar as the basis of this petition is concerned) only in that the judicially implied liability under the 1934 Act that clashes with Section 11

of the 1933 Act arises not under Section 10(b) but under the parallel provisions of Section 14(e).[6]

Indeed, the decision below contravenes the principles of *Blue Chip Stamps* in three respects: (1) by expanding the class to whom an underwriter is liable, (2) by expanding the underwriter's statutory exposure to damages, and (3) by making the underwriter liable for other violations by other defendants for which it bore no responsibility. The decision below has thus done no less than nullify the express limitations of private actions prescribed by Section 11 of the 1933 Act as far as First Boston is concerned.

III.

As originally enacted, 48 Stat. 82, Section 11 of the 1933 Act imposed upon underwriters both the duty of due diligence with respect to the content of registration statements and a broad "rescission" measure of damages such as that adopted by the Court of Appeals here. After brief experience, however, Congress found that the exposure to liability created by the statute had caused a substantial disrup-

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[6] In another case under Section 10(b), *Ernst & Ernst* v. *Hochfelder*, *cert. granted*, 95 S. Ct. 1557, the SEC, at pages 8 and 9 of its brief as *amicus curiae*, argues, in language equally applicable to Section 14(e):

> "The private right of action to recover damages for violation of Rule 10b-5 is a judicially created remedy, designed to further the purposes of the federal securities laws. In determining whether damages should be awarded for a particular violation of Rule 10b-5, the limitations upon damage liability that Congress imposed in those sections of the federal securities laws that expressly provide for private damage suits for violations of those laws constitute an appropriate guideline for the courts in determining the scope of the implied action under Rule 10b-5."

tion in the capital formation process and, as a part of the 1934 Act itself, amended Section 11, 48 Stat. 907, to limit the damages recoverable in two significant respects:

> (1) Damages may not include any diminution in the value of securities "other than the depreciation . . . resulting from" the particular omission or misstatement.
>
> (2) The liability of an *underwriter* is limited to the "total price at which the securities underwritten by him and distributed to the public were offered to the public."

These amendments embody a deliberate policy decision by Congress, and were characterized by Senator Fletcher, in introducing them on the floor of the Senate, as "the most important of all" the amendments to the 1933 Act adopted with passage of the 1934 Act. *See Blue Chip Stamps* v. *Manor Drug Stores, supra* at 1927-28.

The damages awarded to Chris-Craft by the Court of Appeals were for "loss" in the market value of a security other than the registered security—indeed, a security of a different issuer—that was caused in large part by a general market decline, and not in any sense "resulting from" the error in the registration statement. The award of $35,000,000 also totals over *four times* the total price of the securities underwritten by First Boston. In both respects, the Court of Appeals' decision is in clear conflict with an express determination of Congress as recognized by this Court. See *ibid.*[7]

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[7] Again, the SEC aptly argues at page 24 of its brief in *Ernst & Ernst, supra:*

> "Since the theory of the implied private right of action under the federal securities laws is that it is necessary to effectuate the congressional standards for the conduct of securities transactions, the standards Congress adopted when it expressly created private actions under those laws are an appropriate guideline in defining the contours and conditions of the judicially-created right of action."

First Boston was also held liable "jointly and severally" for these huge and speculative damages, despite the fact that its liability stems only from the registration statement and from but one of several violations held to have caused the damage. In view of First Boston's limited and secondary role, joint and several liability for the whole of this award—over 900 times its fee and half its net worth—is unreasonable and completely disproportionate to the wrong it was found to have done, as well as contrary to law.

IV.

In granting recovery to Chris-Craft, the decision below also seriously misapplied *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375. In *Mills* the Court held that causation of injury to public shareholders necessarily existed where there was a material omission from a proxy statement for a corporate merger. The Court emphasized, however, that the nature of the relief must be based on proof of actual damages, if any, and the equities of the particular case. *See Rondeau* v. *Mosinee Paper Corp.*, 95 S. Ct. 2069; *see also* Brief for the SEC as Amicus Curiae, *Ernst & Ernst* v. *Hochfelder*, No. 74-1042, at 23-32.

Here, the Court of Appeals used *Mills* in the entirely different context of a huge damage action by a party that in no sense relied on a registration statement to establish as a matter of law both the fact of injury and the causal nexus between an omission from the registration statement and the claimed damages.

Such a departure from basic tort principles requiring proof of causation in fact is in no way supported by *Mills*,

as was recognized by the District Court in this case. Rightly rejecting Chris-Craft's reliance on *Mills*, the District Court noted that Chris-Craft was not a purchaser on the registration statement but was "seeking to recover because of the effect which a misstatement allegedly had on third parties" (A145).

By taking a contrary approach and dispensing with proof of causation, the decision of the Court of Appeals both misconstrues *Mills* and is inconsistent with the disapproval in *Blue Chip Stamps, supra* at 1925, of "conjectural and speculative recovery" of damages in implied actions under the 1934 Act.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Addendum

Text of Statutes Involved

Section 14(e) of the Securities Exchange Act of 1934, 82 Stat. 457, as amended, 84 Stat. 1497, 15 U.S.C. § 78n(e), provides:

"(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

In relevant part, Section 11 of the Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U.S.C. § 77k, provides:

"(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

* * *

(5) every underwriter with respect to such security.

* * *

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

* * *

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert . . . he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . .

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

* * *

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the

amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public."

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MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Securities Industry Association ("SIA") hereby moves for leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari of The First Boston Corporation ("First Boston"). This motion is necessary because Chris-Craft Industries, Inc. refused to consent to the filing of an amicus brief by SIA.

The SIA was formed in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Bankers Association of America. The SIA has approximately 700 members from all parts of the United States, all of whom are engaged in the securities business. The SIA is generally recognized as spokesman for the securities industry to the public and to the Government.

The April 11, 1975 decision of the Second Circuit Court of Appeals in this litigation for the first time held that a dealer manager in an exchange offer (and statutory underwriter) would be liable for an amount in excess of the total price of the securities distributed to the public pursuant to the offer. As the effect of this decision is to repeal portions of Section 11 of the Securities Act of 1933 and substitute unlimited, court-imposed liability (in this case amounting to one-half of the net worth of the investment banker), the decision is of great concern to the securities industry.

Through the attached brief, the SIA wishes to point out to the Court the grave consequences to the securities industry of the Second Circuit's decision, and to emphasize the legal issues which are applicable to the securities industry as a whole. The SIA therefore respectfully prays that the Court grant this motion for leave to file its brief in support of First Boston's petition.

Respectfully submitted,

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BRIEF OF SECURITIES INDUSTRY ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This Brief is submitted on behalf of the Securities Industry Association ("SIA") as *amicus curiae* in support of the petition for a writ of certiorari filed by The First Boston Corporation ("First Boston"). The issues that are raised by the unprecedented damage award levied against First Boston are important not only to investment bankers but to all parties in the capital formation process, and the SIA strongly believes these issues merit the attention of the Court.

The SIA was formed in 1972 through the merger of the Association of Stock Exchange Firms and the Investment

Bankers Association of America. The SIA is generally recognized as spokesman for the securities industry to the public and to the government.

Statement of the Case

First Boston was the dealer manager for an exchange offer, for which it received a fee of $40,000. Although the plaintiff, Chris-Craft Industries, Inc. ("Chris-Craft"), acquired no securities through the exchange offer, the Court of Appeals held First Boston jointly and severally liable to Chris-Craft for an amount exceeding $35,000,000. The sole basis of First Boston's liability was the good faith omission from the registration statement prepared for the exchange offer of the fact that the issuer had received and was considering an offer for an asset which was substantially lower than the carrying value of the asset.

While granting the SEC equitable relief (D1-21),[1] the District Court denied Chris-Craft relief on all of its claims against several defendants, including its attack on the registration statement (A125-162). As to First Boston, the Court found it had "acted solely" in "good faith" and accordingly found no basis for liability (A158-159).

The Court of Appeals reversed (A1-124), holding First Boston liable to Chris-Craft because it "did not adequately perform its duty" (A51) as an underwriter under Section 11 of the Securities Act of 1933 ("The 1933 Act"). The court held that First Boston owed this duty not merely to purchasers of the underwritten securities, but to Chris-Craft as well (A55).

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[1] The opinions below are reproduced in Joint Appendices A through E submitted with First Boston's petition. The page references herein are to that volume.

On remand, in response to the Court of Appeals' directive to determine "the reduction in the appraisal value" (A69) of Chris-Craft's shareholding in Piper Aircraft Corporation ("Piper"), the District Court found after trial that this reduction in appraisal value was $1,673,988 (B70). Prejudgment interest was also allowed (B76-79).

The Court of Appeals again reversed, however, saying that by "reduction in the appraisal value" it meant a rescission measure of damages, formulated as the difference between Chris-Craft's purchase price of the Piper shares and the price at which it could have sold such shares at a subsequent date (B25-31). Because of the decline in the market during this period, the court fixed the hypothetical sales price at a figure less than half the purchase price. The court thus awarded Chris-Craft damages of $25,793,365 (B31) and approximately $10,000,000 in prejudgment interest (B32-34).

The following important issues are raised by the opinions of the Court of Appeals:

1. Should the special "duty" and "absolute liability" imposed upon an underwriter of registered securities by Section 11 of the 1933 Act be implied under Section 14(e) of the Securities Exchange Act of 1934 ("The 1934 Act") in favor of parties to whom the registration statement was not addressed?

2. May a statutory underwriter be held liable under Section 14(e) for damages far in excess of the maximum permitted by Congress under Section 11 of the 1933 Act for the same conduct?

3. Should damages against multiple defendants be assessed on a joint and several basis in a case where the violations of the securities laws are separate and

distinguishable, without regard to the respective roles of each defendant?

Argument

I.

This Case Presents Important Questions With Respect to the Application of the Federal Securities Laws to Contests for Corporate Control and to the Duties Owed Non-Purchasers by Underwriters.

The Court of Appeals held that an unsuccessful contestant for corporate control has an implied right of action for damages under Section 14(e) of the 1934 Act. The decision has led to substantial uncertainty in the investment community both as to the basis upon which recovery can be had in such actions and as to the exposure to damages of professional advisors, such as First Boston, who are joined as collateral parties.

Congress did not intend "to discourage take-over bids" by passing the Williams Act, of which Section 14(e) was a part. *Rondeau* v. *Mosinee Paper Corp.*, 95 S. Ct. 2069, 2076. The decision below, however, will necessarily have that effect because it will fuel the already inevitable litigation that accompanies every battle for control, as the losers in the marketplace seek to secure consolation prizes in the form of huge damage awards.

The decision of the Second Circuit here also conflicts with the decision of the Fifth Circuit in *Sargent* v. *Genesco*, 492 F.2d 750 (5th Cir. 1974), in which the Court stated:

> "The evil to be remedied was inadequate disclosure to tendering security holders. Congress made it clear that the investor protection sought by 14(e) was disclosure to those who had to make the hold or sell decision." 492 F.2d at 769.

The Court then held "[n]o violation of 14(e) could be shown where the class sought to be protected has not been harmed." 492 F.2d at 769.

By expanding their exposure to legal liability far beyond any previous bounds, the decision below will inevitably deter investment banking firms and other professionals from acting as advisors to competing offerors. The assessment of damages of such magnitude should be given special scrutiny in light of Chief Judge Cardozo's caution in *Ultramares Corp.* v. *Touche,* 255 N. Y. 170, 179-80 (1931), that the "hazards of a business conducted" on terms of exposure to "liability to an indeterminate class" are "so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

This Court in *Blue Chip Stamps* v. *Manor Drug Stores,* 95 S. Ct. 1917, has limited the exposure to liability of the principals as well as their advisors under Section 10(b) of the 1934 Act; the present case provides similar issues under Section 14(e).

The Court has also agreed to determine the standard of culpability necessary to sustain an action for damages against a professional under Section 10(b) in *Ernst & Ernst* v. *Hochfelder, cert. granted,* 95 S. Ct. 1557. The same determination should also be made with respect to Section 14(e), and this is an appropriate case for that purpose, involving as it does, only judgments made in good faith with which an appellate court later disagreed (A158-159).

II.

The Magnitude of Damages Assessed Against First Boston Contravenes the Express Intent of Congress.

While utilizing Section 11 of the 1933 Act to find First Boston liable, the Court of Appeals ignored the express

damage limitations and causation principles prescribed in that statute.

Section 11 as originally enacted contained both the standard of "absolute liability" commonly known as the duty of due diligence, and a rescission measure of damages such as that utilized by the Court of Appeals. In passing the 1934 Act, however, Congress amended Section 11 to limit the damage exposure of underwriters in two significant aspects:

> 1. Damages may not include any diminution in value not "resulting from" a breach of the underwriter's duty, and
>
> 2. The liability of an underwriter is limited to the "total price at which the securities underwritten by him and distributed to the public were offered to the public".

15 U.S.C. § 77k(e).

Section 11's requirement that there be a causal nexus between the violations and the damages asserted would absolutely preclude the rescission measure of damages adopted by the Court of Appeals. Congress enacted the amendment to Section 11 specifically to avoid claims for damages resulting from a general market decline. *See* 78 Cong. Rec. 10185-86 (June 7, 1934).

The Court of Appeals, citing *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, held that the fact that Bangor Punta Corporation might not have gained control of Piper without making the exchange offer was sufficient proof that the deficiency in the registration statement prepared in connection with the exchange offer "caused" Chris-Craft to

lose the contest and to suffer huge "damages" as the market value of Piper shares later declined. *Mills* supports no such proposition, and the Court of Appeals' mischaracterization of it contravenes the express causation requirement of Section 11.[2]

Under Section 11, moreover, First Boston's maximum possible liability for damages, assuming causation in fact, was "the total price" of the securities "distributed to the public," which was approximately $8,000,000. The award of $35,000,000 totals over *four times* the total price of the securities underwritten by First Boston.

III.

A Dealer Manager in an Exchange Offer Should Not Be Held Jointly and Severally Liable for Separate and Independent Violations of Law by its Principal and Other Defendants.

The Court of Appeals held that First Boston had violated the securities laws only with respect to its conduct as a dealer manager in the exchange offer to the Piper shareholders. Yet First Boston was held jointly and severally liable with its principal and the other defendants for various other purported violations of the securities laws they were found to have committed. For example, First Boston did not participate in its principal's purchase of 120,200 shares of Piper stock which the Court of Appeals held

---

[2] Recognizing the detrimental effects of assuming causation for damages in an action where the defendant has not acted fraudulently or in bad faith, the SEC has taken the position that, in such circumstances, a clear nexus between any claim for damages and alleged violations must be shown. Brief for the Securities and Exchange Commission as *Amicus Curiae, Ernst & Ernst* v. *Hochfelder,* No. 74-1042, at 8-9.

violated Rule 10b-6 under the 1934 Act. The Court found that the acquisition of those shares was an essential step in obtaining control of Piper.

In *White* v. *Abrams,* 495 F.2d 724 (9th Cir. 1974), the Ninth Circuit suggested that with respect to actions under the 1934 Act a flexible duty standard should be applied in determining liability in an action involving multiple defendants. Under this approach the Court considers a number of factors, including benefit to the defendant, reliance, and who had initiated the transaction. The equitable considerations underlying it apply with special force to a determination of damages against parties in the position of First Boston.

Investment bankers in tender offer situations usually play a secondary role and the overall battle for economic control may rage on many other fronts of which the banker may have little, if any, knowledge. The trial court found that First Boston had played such a secondary role here and the Court of Appeals affirmed that finding.[3] The limited interest of First Boston in the entire matter was its $40,000 dealer manager's fee which was based on its services as a dealer manager. The record shows it had no substantive

---

[3] The Court of Appeals stated at footnote 25 of its opinion on liability:

> "We agree with the district court that there is no merit to CCI's [Chris-Craft's] other claims against First Boston, essentially that it was the chief strategist for Piper and BPC in the control battle. The district court found, based on substantial evidence, that in its capacity as investment banker First Boston merely provided professional services to these companies. The business decisions that led to violations of the securities laws were initiated by these companies, not by First Boston in its role as investment banker. We are aware of no authority for holding First Boston liable in that capacity." (A55)

decision making power (A55). First Boston was not held to have acted with fraudulent intent or for the purpose of causing injury in any way to Chris-Craft in failing to make the particular disclosure involved.

We submit that in such circumstances the imposition of joint liability upon First Boston for all damages held to have been suffered by Chris-Craft is inequitable and totally unnecessary to effective enforcement of the securities laws.

CONCLUSION

For the reasons stated, First Boston's petition for a writ of certiorari to the Second Circuit Court of Appeals should be granted.

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Respondents.

FIRST BOSTON'S REPLY BRIEF

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FIRST BOSTON'S REPLY BRIEF

Chris-Craft's Brief in Opposition employs emotive language and factual distortion to obscure the straightforward and important legal issues raised by this case and presented by First Boston's Petition. These issues go to the heart of enforcement of the federal securities laws as a coherent whole and demand resolution by the Court.

"Fraud"

Chris-Craft seeks to avoid the basic issue as far as First Boston is concerned: Can Chris-Craft create an action under Section 14(e) of the 1934 Act out of Section 11 of the 1933 Act and thereby be relieved from Section 11's express limitations on an underwriter's liability? In pursuit of this goal, Chris-Craft chants "fraud" and "fraudulent" for page after page as if it were thereby invoking a magic talisman that would convert a failure to discharge the duty of due diligence under Section 11 into an action under Section 14(e).

The court below, however, did not find that First Boston had committed "fraud" on Chris-Craft or anyone

else. Indeed, the Court of Appeals left undisturbed the trial court's finding that First Boston had "acted solely" in "good faith" (A158-59; *see also* A55 n. 25).

Chris-Craft's recovery from First Boston was based *solely* on the ground that First Boston failed to discharge its special statutory duty as a 1933 Act underwriter (A48-51). Section 14(e) of the 1934 Act was used as a basis for affording Chris-Craft *standing* to sue First Boston (A49, A55), but the basis of liability was the standard of care prescribed for an underwriter by Section 11 of the 1933 Act (A48-51, B10).[1]

Chris-Craft's whole argument against First Boston thus comes down to the proposition that a failure fully to perform the special statutory duty of due diligence of a 1933 Act underwriter is equivalent to "fraud," so that by such characterization a plaintiff without a claim under the 1933 Act can recover under the 1934 Act without proving anything more, and with all the 1933 Act limitations on an underwriter's liability swept away. (*Compare* Brief at 4, 31-34 *with* A48-55, B10.) Chris-Craft's dependence on such an equation and characterization to justify the decision below emphasizes the importance of this case and the need for its review on certiorari.

Standing and Damages

Chris-Craft describes as "sham" (Brief at 19) the question of its standing to sue under Section 14(e) of the

[1] Chris-Craft's claim that "the violations stand admitted" (Brief at 14) is untrue, but, were it true, it would not dispose of the questions raised by the Petition. The similar claim that Chris-Craft "concededly" would have been the leader in the contest for control but for the alleged violations of defendants is also untrue (see pages 4-6, *infra*), as are all its other claims of admission or concession.

1934 Act.[2] The questions Chris-Craft thereby seeks to dismiss are far from "sham."

The court below has granted Chris-Craft recovery under the 1934 Act against First Boston *as a 1933 Act underwriter*, despite the fact that the 1933 Act confines underwriters' liability to purchasers of the registered security. Moreover, it has awarded Chris-Craft damages four times the maximum permitted by the 1933 Act.

The extraordinary anomaly of affording greater recovery to a plaintiff not within the group Congress sought to protect by the 1933 Act than would be available to the express beneficiaries of the Act is nowhere addressed in Chris-Craft's brief.[3]

The issues thus raised are both important and unresolved. Indeed, in contrast to Chris-Craft's assertion (Brief at 4) that it is "settled law," the Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), has expressly held open the question whether an implied action under the 1934 Act "will lie for actions made a vio-

---

[2] The legislative history of the Williams Act, including the very portion cited by Chris-Craft (Brief at 20), shows that Congress in enacting Section 14(e) was not seeking to protect contestants for control, but was instead concerned with "protection of investors" and affording "shareholders a fair opportunity to make their decision." H. R. REP. No. 1711, 90th Cong., 2d Sess. 4 (1968).

[3] Far from seeking "to make bankers a privileged class" (Brief at 33), we urge only that the *special* duties and liabilities imposed upon bankers by Congress should not be expanded beyond the bounds fixed by Congress itself.

lation of the 1933 Act and the subject of express civil remedies under the 1933 Act." 95 S.Ct. 1917, 1933 n.15.[4]

Causation

Chris-Craft's theory of "causation" is fully stated at page 24 of its brief. It is but a variant of the *post hoc, ergo propter hoc* fallacy: a causal relationship between the alleged violations and Chris-Craft's loss of the contest for control is deemed shown merely from the fact that the violations occurred and the fact that Chris-Craft lost the contest.

Neither the evidence nor logic affords any basis whatever for concluding that the omission of the BAR sale possibility affected the success of the Bangor Punta exchange offer in any way. In fact, all indications are to the contrary—the record shows the market went up when the sale of the BAR was later agreed upon and announced (591a), and no tendering shareholder has ever sued Bangor Punta or First Boston claiming that he was misled to his detriment by the omission.

Unlike Chris-Craft in its presentation to this Court, the court below did not suggest that causation *in fact* was established by the record. Instead it relied upon a *legal*

---

[4] *Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951), and the other lower court decisions cited at pages 32-33 of Chris-Craft's brief have permitted such actions only to the limited extent of allowing a *purchaser or seller* of securities of the same issuer to recover under the 1934 Act from those responsible for a 1933 Act registration statement *if they can prove fraud.* This is a far cry from holding that a *non-purchaser* such as Chris-Craft may recover under the 1934 Act for a failure to discharge a special duty created by the 1933 Act. And even *Fischman's* limited exception has not been approved by this Court.

presumption of causation said, incorrectly, to have been established by *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375.

Seeking to cloud the decisional and precedential significance of the Court of Appeals' elimination of causation as a factual issue, Chris-Craft's argument transgresses the bounds of advocacy and affirmatively misrepresents to the Court the state of the record and the decision below:

At page 10 of its brief, Chris-Craft states:

> "No one defends the BAR fraud in this Court. The impact of this fraud, established by the trial record, was dramatic. Chris-Craft's exchange offer attracted slightly more Piper shares than had Bangor's fraudulent offer (A18). Thus, if disclosed, the $13,400,000 BAR loss would have been critical. The Second Circuit declared:
>
> > '. . . BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers. . . . [I]t is clear that the 7% acquired through its exchange offer was critical to its success.' (A60)"

This curtailed quotation can only be taken to mean that the record proved as a *fact*, and the Court of Appeals found as a *fact*, that Bangor Punta's exchange offer would have failed had mention of the BAR sale possibility been made.

The record contains *no* such proof and the Court of Appeals made no such *factual* finding. The Court of Ap-

peals said something much different, as language omitted from Chris-Craft's brief shows (A60; emphasis added):

> "In applying the *Mills-Ute* test to the instant action, we *presume* that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations to which we have referred above. Even if we assume arguendo that BPC's offer was superior to that of CCI, taking into account the BAR loss, we still *must conclude* that BPC's success was unlawfully attained. Piper shareholders had a third option, i.e. to hold their shares, which *presumably* they would have chosen if all the material facts had been disclosed. *Under the Mills-Ute test, we must presume that* BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers. See *Vine* v. *Beneficial Finance Co., supra,* 374 F.2d at 635. Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown."

This wholly unjustified *presumption* of causation (a presumption in favor of a non-purchaser who in no sense relied on the registration statement) rests upon a grave misconstruction of *Mills,* and, in contravention of the most basic legal norms, affords recovery where there is no injury. It cannot be allowed to stand as a rule of decision.

Conclusion

For the reasons stated in the Petition and herein, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Opinions Below

The opinion of the Court of Appeals on liability (A1-124)[1] is reported at 480 F.2d 341, and its subsequent opinion on damages (B1-42) is reported at 516 F.2d 172. The opinion of the District Court on liability (A125-62) is reported at 337 F. Supp. 1128, and its opinion on damages (B43-87) is reported at 384 F. Supp. 507.

Prior opinions of the Court of Appeals (C1-31) and the District Court (C32-48) with respect to an application

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[1] The Appendix in this Court is divided into sections A through F, and "A", "B", "C", "D", "E", and "F" page references are to that volume. The printed Appendix in the Court of Appeals is cited as "App.", except the exhibit volumes, which are cited "EV".

for a preliminary injunction are reported at 426 F.2d 569 and 303 F. Supp. 191, respectively. The opinions of the District Court in the related cases of *SEC* v. *Bangor Punta Corporation* (D1-21) and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (D22-34) are reported at 331 F. Supp. 1154 and 337 F. Supp. 1147, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (E1-2), and timely petitions for rehearing were denied on June 9, 1975 (E3-8). Petitions for writs of certiorari were filed September 5, 1975 and granted April 5, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Section 14(e) of the Securities Exchange Act of 1934, 82 Stat. 457, as amended, 84 Stat. 1497, 15 U.S.C. §78n(e), Section 28(a) of the Securities Exchange Act of 1934, 48 Stat. 903, 15 U.S.C. § 78bb(a), and relevant provisions of Section 11 of the Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U.S.C. § 77k, are set forth as an addendum to this brief.

Questions Presented

This case arises out of a contest between respondent Chris-Craft Industries, Inc. ("Chris-Craft") and petitioner Bangor Punta Corporation ("Bangor Punta") for control of Piper Aircraft Corporation ("Piper"). Bangor Punta was the apparent victor.

Petitioner The First Boston Corporation ("First Boston") acted as dealer-manager and statutory underwriter for an exchange offer, registered under the Securities Act of

1933, through which Bangor Punta acquired about 7% of Piper's shares. Petitioners Salgo and Wallace were officers and directors of Bangor Punta at the time of the contest, and petitioners Howard, Thomas and William Piper ("the Pipers") were officers and directors of Piper who opposed Chris-Craft and favored Bangor Punta.

The decision below awarded Chris-Craft damages against all petitioners, jointly and severally, for loss of the contest. First Boston was held liable under § 14(e) of the Securities Exchange Act of 1934 solely on Chris-Craft's claim that an omission in the registration statement for Bangor Punta's exchange offer was misleading to those who accepted it; Chris-Craft was not a purchaser of the registered securities. Bangor Punta and its officers were held liable both for that omission and on an additional and unrelated ground. The Pipers were held liable for entirely different and unrelated acts.

The following questions are presented with respect to the judgment entered below against First Boston; additional questions, not relating to First Boston, are presented in the briefs of the other petitioners.

1. May a contestant for control of a corporation maintain an action for money damages under § 14(e) of the Securities Exchange Act of 1934 against the underwriter of a rival exchange offer, registered under the Securities Act of 1933, upon the claim that there was a material omission in the prospectus for that offer?

2. May an underwriter that acted in good faith and without intent to deceive be held liable in such an action?

3. May causation of injury and damages be presumed in such an action, in the absence of any supporting proof and in the face of a contrary finding by the trier of fact?

4. In such an action, if injury is established (a) what is the proper measure of damages; (b) should damages be awarded jointly and severally against defendants held to have committed separate and unrelated wrongs; and (c) may an underwriter be held liable for damages in an amount far exceeding the limitation on damages expressly prescribed for underwriters by § 11 of the 1933 Act?

Statement of the Case

The Contest for Control of Piper

Chris-Craft started to purchase shares in Piper in December 1968, and by January 23, 1969, had bought 203,700 Piper shares, or about 13% of the shares outstanding. On that day it made a cash tender offer for up to 300,000 more shares at $65 per share, a 25% premium over the market price of $52. (A10, 128)

After consultation with its legal, accounting and financial advisers, Piper's Board determined to oppose Chris-Craft's offer and advised their shareholders on January 27 and 28, 1969, that "it is inadequate and not in the best interests of Piper's shareholders" (A10-11).[2] Seeking a more favorable alternative, Piper entered into an agree-

[2] First Boston, Piper's investment bankers, had advised that from the standpoint of price alone $65 per share was fair, but that the limitation of the offer to 300,000 shares was not beneficial to the shareholders. The Board did not limit its consideration to price alone; rather, it took into account a number of factors, including the limitation to 300,000 shares (about 18% of the shares outstanding) and the possible adverse consequences of a merger between Piper and Chris-Craft should Chris-Craft acquire control and be able to compel one. (A37-38, 135-36; App. 2051-54; EV 467).

ment with Grumman Aircraft Engineering Corporation by which, subject to certain conditions, Grumman agreed to purchase 300,000 unissued Piper shares at $65. The agreement was announced the next day, January 29, as a first step toward consideration of a merger of the two companies; the announcement stated that the agreement was conditional but did not mention the fact that Grumman had the option to cause Piper to find another purchaser for the shares or to repurchase them. (A11-12)

Despite the opposition of Piper's Board and the announcement of the Grumman deal, Chris-Craft succeeded in acquiring 304,000 shares through its tender offer, which it allowed to expire without extension on February 3, 1969. Chris-Craft also purchased another 38,000 shares in the market during the period of its offer (A12), and had thus acquired by February 3 a total of 547,106 shares, or 33% of the shares outstanding (A12), a somewhat larger block than the 31% controlled by the Piper family. (A128)

On February 27, 1969, Chris-Craft filed a registration statement with the SEC for a proposed exchange offer to Piper shareholders. The Grumman agreement was terminated three weeks later on March 19, 1969, leaving the field to Chris-Craft, but Chris-Craft's exchange offer did not become effective until two months later on May 15, 1969. (A12-13)

During March and April, Piper's management continued to seek alternatives for the company's shareholders, and on May 8, 1969, the Piper family sold its 31% interest to Bangor Punta (A13-14). As part of an agreement announced that day, Bangor Punta undertook to make an exchange offer for all of the Piper shares still held by the

public, the offer to be of securities having a value in First Boston's judgment of $80 per Piper share (A14-15). First Boston agreed to act as dealer-manager and statutory underwriter for this offer, for which it received a fee of $40,000 (EV26). The offer was duly made by a registration statement filed on May 29, 1969, and made effective on July 18, 1969—some two months after the effective date of Chris-Craft's exchange offer (A17).

Shortly after its purchase of the Piper family's shares, Bangor Punta in mid-May purchased an additional 120,000 shares in off-exchange transactions from three large investors (A16). Following these purchases, Bangor Punta held 38% of Piper's shares, Chris-Craft held 34%, and 28% remained in the hands of public shareholders.

Chris-Craft's exchange offer did not meet with a favorable reception from Piper shareholders when it became effective on May 15, 1969, and a week later, on May 22, Chris-Craft turned from the marketplace to the courtroom (A17-18).

In its complaint, Chris-Craft charged, among other things, that Bangor Punta's mid-May cash purchases had violated § 10(b) of the 1934 Act, as implemented by Rule 10b-6, and sought a preliminary injunction against further purchases by Bangor Punta. While preliminary proceedings were under way, Bangor Punta's exchange offer became effective on July 18, and Chris-Craft on July 24 improved its exchange offer to make it more competitive (A17-18).[3] Each company acquired an additional 7% of the Piper shares through its offer (A18), and on August 4, 1969, Bangor Punta had a total of 44.5%

[3] Even after the improvement, Chris-Craft's offer was consistently valued in the market at well below Bangor Punta's offer (A140 n.10). Chris-Craft did not further improve its package because, "We felt we had gone as high as we could go" (App. 1418).

while Chris-Craft had 40.6%—and 14.9%, more than enough to decide the contest in favor of either party, still remained in the hands of the public.

Both companies then re-entered the market to make cash purchases and did so until August 19, 1969, when the District Court handed down its decision denying Chris-Craft's motion for a preliminary injunction, saying:

> "Neither party has gained control of Piper, and both are still in a position to do so." (C47)

The Court of Appeals *en banc* subsequently affirmed:

> ". . . we conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage." (C9)

Upon the failure of its efforts to gain the upper hand through litigation, however, Chris-Craft abruptly halted its purchases of Piper shares and "withdrew from the battle" (B7). The inevitable result of Chris-Craft's withdrawal was soon realized when Bangor Punta's continued purchases on the market brought its holdings of Piper shares to 51% on September 5, 1969 (B7; *see* A115-16).

The Aftermath of Litigation

A. Chris-Craft's Claims

Following the end of the control contest, Chris-Craft devoted its full energies to an effort to redeem through liti-

gation its failure in the marketplace. Although the Court of Appeals *en banc* unanimously affirmed the denial of Chris-Craft's motion for a preliminary injunction, a majority of the court—over the strong dissent of Chief Judge Lumbard (C21-31), echoed by Judge Moore (C18-20)—agreed with Chris-Craft in two respects. First, the court said that the May 8 announcement that Bangor Punta had agreed to make an exchange offer valued at $80 per Piper share was improper "gun-jumping" (*i.e.*, making an offer before filing a registration statement). Second, the court ruled that Bangor Punta's cash purchases shortly thereafter appeared to violate Rule 10b-6, unless an exemption applied, a question left for determination by the trial court (C9-18). The case was remanded for further proceedings.

In June 1970, Chris-Craft filed an amended complaint adding several new allegations of improper conduct or inadequate disclosure against the various defendants. In this complaint, Chris-Craft claimed for the first time that the registration statement for Bangor Punta's exchange offer a year earlier had been deficient in not mentioning an alleged agreement by Bangor Punta, at the time of the exchange offer, to sell one of its assets (a 99% shareholding in the Bangor and Aroostook Railroad, known as the "BAR") for $5 million, which was $13 million less than its carrying value on Bangor Punta's books, as reflected in the financial statements appearing in the registration statement (F1, 21). The SEC came to Chris-Craft's support on this new charge by filing its own action raising the same claim in September 1970; First Boston was not a defendant in the SEC action, which sought equitable relief against Bangor Punta alone (F81, 83-84).

B. The BAR

The facts with respect to the BAR are fully stated in the District Court's opinion in the SEC action (D1-18); briefly they are as follows:

The BAR's assets had a net historic cost basis of $29 million, and the BAR could properly have been carried on Bangor Punta's books at that amount; it was in fact, however, carried at the more conservative value of $18 million based on a 1965 appraisal of market value by financial experts (D3-4).

The BAR consistently failed to produce an acceptable return on investment, and Bangor Punta had considered since at least 1967 disposing of it by merger, sale or otherwise. On April 1, 1969 a committee of four directors was appointed to study the possible divestiture of the BAR, and on May 21, 1969, it reported to the Board on various possibilities, including an indication by a potential purchaser that it might pay $5 million. The Board authorized further negotiations, seeking a higher price and subject to tax and accounting analyses. The prospective buyer would not increase its price, and on June 3, 1969, Bangor Punta's management "decided to table the matter" pending "a time-consuming and complex" tax study (D5-8 & n.6).

Thus, when the Bangor Punta registration statement became effective on July 18, 1969, the BAR matter was in limbo, and it remained so through the expiration of the exchange offer on July 29 and through the post-distribution period, ending August 27, 1969, during which prospectuses were still required to be delivered by dealers buying or selling the registered securities (D8-9).

In connection with the preparation of the Bangor Punta registration statement, First Boston as a statutory underwriter[4] conducted a full investigation of Bangor Punta's affairs. In the course of this investigation, First Boston and its counsel became acquainted with the background and status of the BAR matter by reading the minutes of the April 1 and May 21 Board meetings (A51-54 & n.23) and by questioning Bangor Punta officials and learning from them of the June 3 management decision to "table" the matter. (A48; App. 1659, 1759-61)

The record does not indicate that anyone working on the registration statement thought that consideration of the BAR matter had reached the stage where disclosure was required or even appropriate (*cf.* A122-23). Among those involved in preparation and review of the registration statement, in addition to Bangor Punta's management and personnel of First Boston, were Bangor Punta's general counsel; First Boston's counsel, Sullivan & Cromwell; and Bangor Punta's independent auditors, Peat, Marwick, Mitchell & Co., who had to consent to the use of their opinion therein and did so with full knowledge of the BAR matter (App. 1656-57; 1759-61; EV 87, 89).

Over a month after the Bangor Punta exchange offer had expired—and some three months after the BAR matter had been "tabled" by management—Bangor Punta's Board again took up the BAR on September 9, 1969. After discussing various alternatives, the Board authorized a sale of

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[4] First Boston was not an underwriter in the conventional sense as it did not agree to purchase Bangor Punta securities for distribution, the normal economic function of an underwriter; the SEC, however, takes the position that the dealer-manager of a registered exchange offer is an "underwriter" for 1933 Act purposes and subject to all the duties and obligations of underwriters fixed by that act.

the BAR stock for $5 million if better terms could not be obtained (D9-10). Negotiations followed with the prospective purchaser, no improvement in price or terms could be obtained, and a sale of the stock for $5 million was made on October 2 and announced on October 3, 1969 (D10-11).

The market reacted to the sale as a "bullish" development for Bangor Punta, and its securities rose in price in the days following the announcement (App. 591). No Piper shareholder who accepted the Bangor Punta exchange offer has ever complained about the sale or the lack of any mention of a possible sale in the prospectus.

C. Decisions Below on Liability

This action, the SEC action and a "cross action" (D23) brought by Bangor Punta against Chris-Craft were tried concurrently by District Judge Milton Pollack, who dismissed the various claims of each of the contestants (A125-62, D22-34), but held against Bangor Punta in the SEC action (D1-21).

The District Court Decision

The District Court rejected as having "no substance" the SEC's (and Chris-Craft's) basic contention that at the time of its exchange offer "Bangor Punta intended to sell" the BAR and intentionally delayed doing so to avoid disclosure (D11-13, A143). It further stated that "the Court cannot find that the sale was a reasonable probability at the time and to the people involved," that "Bangor Punta did not intentionally or purposefully mislead Piper shareholders . . . nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft" by omitting mention of the possible sale of the BAR from the prospectus, and that there "was no purposeful con-

nection between the nondisclosure and the contest for control" (D13-14).

The court held, however, that the fact that Bangor Punta had considered disposing of the BAR for a lesser amount "rendered obsolete" the $18 million figure at which the BAR was carried on the balance sheet, and that—whether or not required by accounting principles (D19)—that figure should have been changed or qualified (D14-15).

The court denied the SEC injunctive relief against future violations of the securities laws by Bangor Punta because of the absence of bad faith. But, applying as a "standard of materiality" whether a reasonable Piper stockholder "might have hesitated" to take the Bangor Punta exchange offer had disclosure been made, the court granted the SEC corrective relief in the form of a rescission offer by the company to the shareholders who had accepted the exchange offer (D15-17).[5]

The District Court denied Chris-Craft relief on all claims (A161), including its attack on the Bangor Punta registration statement (A142-48). The court raised the question of Chris-Craft's standing as an unsuccessful contestant for control to seek damages under § 14(e) (A132-34, 146), but did not rule on it since the court found that Chris-Craft had failed to establish the "essential elements" of a claim for damages under the 1934 Act,

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[5] The relief granted by the District Court was directed solely to vindication of the public policy embodied in the securities laws, and not to redress of any economic loss suffered by the tendering shareholders. In fact, as noted above at page 11, upon announcement of the sale of the BAR for $5 million, more than two months after the exchange offer, the market price of Bangor Punta stock went up. No tendering shareholder has ever asserted a claim against Bangor Punta, and *not a single shareholder* accepted the rescission offer made pursuant to the court's order.

including "a form of scienter" and "proof of causal effect" (A144).[6]

With respect to scienter, the court referred to its finding that "the registration statement was unintentionally in error" (A143) and ruled that nothing of which Chris-Craft complained "went beyond mere negligent omission or misstatement of fact" (A148).

As to causation, the court held that proof was required to establish "a reasonable probability that [Chris-Craft's] defeat and damage were connected with the claimed violations" and that no such proof existed (A145).

The court rejected Chris-Craft's argument that it was entitled to a presumption of causation under *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), noting that *Mills* dealt with an action by corporate shareholders attacking a misleading proxy statement of their own company, while Chris-Craft was "seeking to recover because of the effect which a misstatement allegedly had on third parties" (A144-45). The court observed:

> "In effect, Chris-Craft seeks the windfall of a punitive award against Bangor Punta by assuming the role of defender of the public interest in the purity of the registration process. This role has already

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[6] The District Court also noted that Chris-Craft's claim against the registration statement was "not based on the provisions [§§ 11 and 12] of the [1933] Act expressly designed for such complaints," but on §§ 10(b) and 14(e) of the 1934 Act, and thus raised "the question whether and to what extent these general provisions can fairly be construed to override the more specific ones prescribed to implement private actions in complaint of registration statements." Granting that "a violation of the registration requirements" could also be a violation of §§ 10(b) and 14(e), the court said, however, "The reasons and basis for invoking the '34 Act provisions must exist independently." (A144)

> been assumed by the Commission and we could well expect it to be assumed by exchanging Piper holders if there were material harm to them." (A145-46)

The court further said with respect to First Boston that it could not find that First Boston had "committed, or engaged in any course of conduct which operated as fraud or deceit upon Chris-Craft or the public shareholders of Piper," and that even had the record supported the claims against the other defendants, "the Court would be hard put to find any basis for extending liability to . . . First Boston" (A158), which "acted solely" in "good faith" (A159).

The Court of Appeals Decision

On appeal (A1-124), the Court of Appeals set aside none of the District Court's findings—rather, it commended "Judge Pollack's detailed, comprehensive findings of fact, and particularly . . . his evaluation of the facts as found"—but disagreed with "certain of his conclusions" (A7). All three judges in their respective opinions expressly affirmed the trial judge's findings of "good faith" and "lack of intent to deceive" in connection with the BAR (A47, 97-98, 118-19). The court nonetheless reversed the trial court's denial of damages to Chris-Craft, holding First Boston, as well as Bangor Punta, liable on account of the BAR omission, and Bangor Punta and the Pipers liable also on other grounds.

On standing, the Court of Appeals said that Chris-Craft, although not a purchaser of any Bangor Punta securities, was a "victim" (A31) of the alleged violations of § 14(e) because "it got less stock than it needed for control" (A33). Emphasizing "the indispensability of private actions" (A23) to "vigorous enforcement of the

federal securities laws" (A22), the court held that granting a defeated contestant for control "standing to sue for damages" was the most "effective means of furthering the general objective of § 14(e)" (A31). The court further said that while Congress' basic objective in the Williams Act was to protect public shareholders, it was "a fair inference" that Congress intended standing for offerors as well (A30-31).

As to scienter, the court held that "intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws" and that Bangor Punta, though not acting in bad faith or with any improper purpose, had "greatly transgressed" its "allowable area of discretion" in failing to mention the "BAR negotiations" and their "import" for the "book value of the BAR" in the registration statement (A47-48).

First Boston, the Court of Appeals held, was likewise liable to Chris-Craft under § 14(e) of the 1934 Act because it "did not adequately perform its duty" to make a "reasonable investigation" as an underwriter under § 11 of the 1933 Act (A51). The court repeatedly referred to First Boston as an "underwriter," a technical term under the 1933 Act that appears neither in § 14(e) nor in any other substantive provision of the 1934 Act, and engaged in an extended discussion of the role of an underwriter in the 1933 Act registration process (A48-51). The court held that while § 11 of the 1933 Act confines an underwriter's liability to purchasers, § 14(e) "imposes liability upon an underwriter in favor of a competing offeror" (A49).

Although affirming that Bangor Punta had not decided to sell the BAR at the time of its exchange offer (A47), the Court of Appeals said First Boston should have made an

"additional investigation," a "more careful search," to be sure this was so before its "certification" of Bangor Punta's registration statement (A54-55). The court then held that First Boston's failure thus to verify during the registration process a fact that seemed clear to First Boston at the time, and was later judicially determined to be true, constituted conduct that "went far beyond mere negligence" (A54 n.24) and "amounted to an almost complete abdication of its responsibility to potential investors, to [Chris-Craft], and to others who relied upon it to detect misrepresentations" (A55).

Although the court's principal criticism was of the lack of "further investigation," the court in conclusion also faulted First Boston for having actually "possessed enough information reasonably to deduce that the [Bangor Punta] registration statement was materially inaccurate" in using an obsolete book value for the BAR (A55). The court did not discuss the nature of First Boston's responsibility for the presentation of Bangor Punta's balance sheet in the registration statement, or how First Boston's responsibility might correlate with that of Bangor Punta's independent auditors.

On this reasoning, the court concluded that First Boston possessed the requisite degree of culpability ("scienter") for liability under § 14(e) as an "aider and abettor" of Bangor Punta (A55, *see* A34-37, A49).

As to causation, the Court of Appeals overcame the trial court's finding that Chris-Craft had failed to prove "a reasonable probability" that any tendering shareholder's decision would have been affected had there been disclosure of the negotiations for sale of the BAR for $5 million (A145) by holding that the "*Mills-Ute* test" should

be applied in Chris-Craft's favor. The "*Mills-Ute* test," the court held, created a presumption of a causal nexus between the nondisclosure of the BAR matter and the success of Bangor Punta's exchange offer, and the court then further presumed that the success of the exchange offer "was critical" to Bangor Punta's gaining control of Piper (A55-60).

The Court of Appeals also held through similar reasoning that Bangor Punta was liable to Chris-Craft under § 10(b) for its mid-May purchases, found to have violated Rule 10b-6 (but not for the allegedly "gun-jumping" press release of May 8, 1969), and that the Pipers were liable to Chris-Craft under § 14(e) for their January advice to shareholders that Chris-Craft's cash tender offer was "inadequate" and their failure to mention Grumman's "put" when announcing that subsequently aborted deal (A63-67, 41-43, 37-40, 61-63).

Although the three wrongs found to have been committed by the various defendants were separate and unrelated, the Court of Appeals directed entry of a judgment "assessing damages against all defendants jointly and severally" (A69). Damages were to be measured by "the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position, and thus being able to compel a merger at any time" (A69).[7]

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[7] The Court of Appeals also granted injunctive relief against Bangor Punta that precluded it from voting its "illegally" obtained shares for five years, and affirmed the dismissal of Bangor Punta's claims against Chris-Craft and the order requiring a rescission offer granted to the SEC, with modifications not relevant to this petition. The denial of injunctive relief to the SEC because of the unintentional nature of the error in the registration statement was also affirmed over Judge Timbers' dissent (A96-100, 121-23). Petitions for certiorari were denied. 414 U.S. 910.

D. Decisions Below on Damages

On remand, the District Court after trial found that the fair market value of Piper shares at the conclusion of the contest for control was $48 and that, had Bangor Punta not achieved control, Chris-Craft's 42% block, "generously valued," would have carried a 5% premium for the chance of gaining control (B70). It therefore concluded that "the reduction in the appraisal value" of Chris-Craft's shareholding in Piper as a result of Bangor Punta's gaining control was $2.40 per share, or a total of $1,673,988 (B70). The court also allowed Chris-Craft prejudgment interest of about $600,000 on that principal amount (B76-79).

On another appeal by Chris-Craft, the Court of Appeals again reversed (B1-42), saying that by "reduction in appraisal value" it meant a rescission measure of damages —the difference between what Chris-Craft had paid for its Piper shares (an average of $64 per share) (B25) and the price at which it could have sold its shares five months after Bangor Punta had acquired control (B28-31).[8] There had been a pronounced general decline in the securities markets during the five-month period (B66), and the court fixed the hypothetical sales price at $27 per share (B29-31).

On this basis, the court awarded Chris-Craft damages of $25,793,365 (B31). It also "affirmed" the District Court on the award of prejudgment interest (B32-34), as to which it said the District Court "did not abuse its discretion" (B33), without asking or allowing the District Court to consider whether the allowance of interest on

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[8] The court adopted the opinion of one witness, not credited by the trial court (B66, *see* B68-69), that it would have taken five months to accomplish registration requirements under the Securities Act of 1933 and other arrangements for a sale.

a principal amount 15 times larger than the damages it had awarded was an appropriate exercise of "its discretion." The total award of damages, with interest through September 30, 1976, is over $37,000,000.

Petitions for rehearing and rehearing *en banc* were denied on June 9, 1975 (E1-8), and petitions for writs of certiorari filed by First Boston and the other defendants were granted April 5, 1976, and the cases consolidated.

Summary of Argument

The decision below granted a contestant for corporate control the largest recovery of money damages ever awarded under the securities laws.

To do so, it (1) granted the contestant standing to sue for damages under § 14(e) of the 1934 Act, a statute enacted only for the protection of public stockholders, (2) construed § 14(e) to override the specific provisions of § 11 of the 1933 Act governing actions in complaint of registration statements, (3) held unintentional, "good faith" error to be the legal equivalent of fraud, (4) dispensed with the most basic element of an action for damages—proof of causation in fact, and (5) usurped the function of the trial court by fixing damages, in the process disregarding unequivocal congressional commands as to the scope of recoverable damages and as to limitations on the liability of underwriters.

In each of these respects, the court below erred, and each independently compels reversal.

Implied action for damages. Section 14(e) contains no express provision for private civil liability. The legislative history shows that its purpose was to protect only "public shareholders" who are "investors" in companies that are

the targets of tender offers. Congress disclaimed any intent to aid competitors for control through the Williams Act, and the implication under § 14(e) of a right of action for damages upon a competitor is without support in the language or purpose of the statute.

Moreover, Congress did not intend § 14(e) to confer a right of action for damages upon anyone for a deficiency in a 1933 Act registration statement. Section 14(e) was enacted to require disclosure in connection with *cash* tender offers; § 11 of the 1933 Act had already prescribed disclosure standards in the case of *exchange* offers. Section 11 establishes, defines and limits the duties and liabilities of an underwriter of registered securities such as First Boston. In light of the care taken by Congress to deal expressly and precisely with these issues under § 11, no cause of action on a prospectus should be implied under § 14(e).

Finally, examined *a priori* on its own merits, it is unacceptable to afford a tort cause of action for damages to a corporation that complains, not of having been deceived itself, but of a loss of "business opportunity" because of alleged deception of others, an alleged deception that in no way involved disparagement of the complaining corporation.

The inconsistency of such a development with the whole body of Anglo-American civil jurisprudence is aptly illustrated by this case—where the allegedly deceived persons got what they bargained for, have never complained, and would themselves bear part of the burden of paying any judgment. There would be no bound to the flood of baseless, even absurd, litigation that such a doctrine would engender, as disappointed competitors embarked upon lengthy discovery procedures to reap wind-

falls by uncovering "deceit" *in vacuo*—"deceit" about which the "deceived" make no complaint.

Scienter. The holding below that "intent to defraud" was not required for liability under § 14(e) is contrary to this Court's holding as to § 10(b) and Rule 10b-5 in *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), which should apply fully to the parallel provisions of § 14(e). Consequently, the affirmed findings of "good faith" preclude the imposition of liability on Bangor Punta and First Boston.

The decision below erred further in holding First Boston culpable vis-a-vis Chris-Craft by reference to First Boston's duty as a 1933 Act underwriter. That duty, which is one of the highest known to the law, is owed *only* to purchasers of the registered securities.

This error was compounded by the court's misconceived, and ultimately pointless, discussion of First Boston's discharge of that duty in terms of the adequacy of its investigation respecting the BAR. First Boston's investigation led it to the same conclusion reached by the trier of fact after a full trial and not disturbed on appeal, *i.e.*, that the sale of the BAR was not a reasonable probability at the time.

Causation. The decision below departed from the most basic legal norms when it applied what it called the "*Mills-Ute* test" to dispense with the need for proof of a causal nexus between the alleged statutory "violations" and the injury claimed to have been suffered by Chris-Craft. As emphasized by the trial court, causation in fact is an essential element of any claim for damages. This was fully recognized in *Mills* itself, which held only that, in light of the special considerations applying to corporate proxy

statements, liability—but not damages—could be established by a shareholder upon a showing that a proxy statement was materially misleading. *Mills* has no application outside the proxy area, and certainly not to an action by a third party upon a registration statement. This is particularly so here, where there was no economic injury to purchasers of the registered securities, and where the most extreme form of equitable relief suggested as a possibility by *Mills*, a rescission offer, has been decreed and carried out.

The *Ute* half of the "*Mills-Ute* test" also lacks any relevance to this case, as *Ute* dealt with a case of clear economic injury, traditional privity, and obvious reliance by the defrauded parties upon their fiduciary relationship to those who deceived them.

The Court of Appeals thus committed clear error in applying its "*Mills-Ute* test" as a substitute for proof of injury. It compounded this error by presuming as well that the Bangor Punta exchange offer was "critical" to its obtaining control of Piper. No such finding was made by the trial court, and there is no basis to infer that, had the offer failed completely, Bangor Punta would not have acquired control through cash purchases. In fact, Bangor Punta achieved control because, after Chris-Craft "withdrew" from the battle, Bangor Punta continued to make cash purchases until it reached 51%.

Damages. The Court of Appeals formulated a measure of damages that was faithfully applied by the trier of fact after hearing the testimony of witnesses for both sides. The Court of Appeals then substituted a new measure of damages and substituted itself for the trier of fact in applying that new measure. The Court of Appeals' second measure of damages was highly speculative and erroneously included millions of dollars—over half the total

award—due to general market decline, an element of "damages" specifically prohibited by Congress in § 11 of the 1933 Act and § 28 of the 1934 Act.

The Court of Appeals further erred by disregarding § 11's absolute limitations upon an underwriter's liability for damages on a registration statement.

The court also erred in exercising the trial court's discretion as to the award of prejudgment interest by "affirming" the award of such interest after increasing 15-fold the principal amount of damages the trial court had awarded.

The award of massive damages through such error and speculation would be shocking in any case; it is especially so where recovery has been permitted only under an "enforcement rationale," and where the court substantially relaxed normal standards of culpability and cast aside the basic requirement that causation of injury be proven as a fact.

ARGUMENT

POINT I

A contestant for control has no cause of action for damages under § 14(e) of the 1934 Act against the underwriter of a rival exchange offer.

A. Contestants for control are not entitled to sue for damages under § 14(e).

The Williams Act, of which § 14(e) is a part, was passed by Congress in 1968 as an amendment to the 1934 Act. Its purpose was "to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information . . . ." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); *see* S. REP. No. 550, 90th Cong., 1st

Sess. 2-3 (1967) (hereinafter "SENATE REPORT"); H.R. REP. No. 1711, 90th Cong., 2d Sess. 2-4 (1968) (hereinafter "HOUSE REPORT").

Neither § 14(e) nor any other of the Williams Act amendments expressly creates a private right of action for equitable relief or for damages. This Court suggested in *Rondeau* v. *Mosinee Paper Corp., supra* at 60 & n.10, that shareholders of the "target company" may sue for damages under another provision of the Williams Act, and lower courts have permitted such actions under § 14(e), *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974).

Lower courts have also entertained actions for injunctive relief by target companies whose managements are opposing offers, *e.g.*, *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), and, less frequently, by offerors, *e.g.*, *Jewelcor Inc.* v. *Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975). The right to sue for injunctive relief, however, stands on a different basis than the right to sue for damages, *e.g.*, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972); in the tender offer situation, timely injunctive relief can serve to correct disclosure errors for the benefit of shareholders who have yet to make a decision. *Electronic Specialty Co.* v. *International Controls Corp., supra* at 947. An award of damages to an offerer years after the fact serves no such purpose.

Only the court below and the First Circuit in *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973), have allowed a contestant for control to maintain an action for damages under § 14(e).

Judicial implication of private causes of action under federal statutes is by no means automatic; rather, such exercise of judicial power is governed by several criteria

articulated by this Court, including whether the legislative purpose was to provide such redress. *See Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975). Assuming private actions of some sort are found appropriate, a particular private party may not seek and recover damages unless, at a minimum, he is a member of the class "for whose *especial* benefit" Congress enacted the statute and the injury for which he claims compensation is itself the kind of injury Congress sought to prevent. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916).

The Court of Appeals did not approach the question of Chris-Craft's right to sue from the perspective mandated by this Court's decisions. Instead the court held that Chris-Craft was entitled to maintain an action for damages because, in the court's view, granting standing to a defeated contestant would serve the purpose of enforcing the law and deterring future violations (A31, *see* A21-24, 102-03).[9] This Court has consistently held, however, that deterrence in itself, without proof of both injury and "violation of a legal duty to the particular plaintiff," cannot provide a basis for recovery of damages. *Bangor Punta Operations* v. *Bangor & A.R. Co.*, 417 U.S. 703, 717 & n.13 (1974).

The Court of Appeals may have recognized the insufficiency of its "enforcement rationale" because it further

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[9] The Court of Appeals also stated that "well recognized common law principles" would give rise to a tort action by Chris-Craft in these circumstances (A30). If true, this would not support creation of a federal cause of action in Chris-Craft's favor, *Cort* v. *Ash*, 422 U.S. at 84-85; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 738-39 n.9 (1975), and, in any event, it is incorrect. At common law an individual is free to compete as vigorously as he wishes to his own advantage, and one competitor has no remedy against the "unfair" practices of another. 1 HARPER & JAMES, THE LAW OF TORTS 481-85 (1956). To recover for commercial injury despite

suggested that "it is a fair inference" that Congress intended contestants for control to have standing. The court said that such "broader standing" appeared to be "the major contribution provided by § 14(e)," since Rule 10b-5 already covered "all types of exchange offers." (A31)

The "major contribution" of the Williams Act, however, was to provide disclosure requirements with respect to *cash* tender offers, which theretofore had been unregulated, SENATE REPORT 2; *see Rondeau* v. *Mosinee Paper Corp., supra* at 58, not to expand standing as to *exchange* offers. The only respect in which § 14(e) may have extended standing beyond the "purchaser-seller" confines of § 10(b) of the 1934 Act, *see Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), is to give standing to an injured shareholder, "whether or not he has tendered his shares." *Smallwood* v. *Pearl Brewing Co.,* 489 F.2d at 596.

There is no basis in the legislative purpose for according standing to a contestant for control to sue for damages, for, as observed by the Ninth Circuit, "the Williams Act was designed to protect cash tender offerees, not offerors." *Klaus* v. *Hi-Shear Corp.,* 528 F.2d 225, 232

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this "privilege of competition," a plaintiff must prove either independently tortious conduct directed at him, such as defamation, *id.* at 474-81, or malicious acts motivated by ill-will toward him rather than economic self-interest, W. PROSSER, THE LAW OF TORTS 955 (4th ed. 1971); *Tuttle* v. *Buck,* 107 Minn. 145, 119 N.W. 946 (1909); *Keeble* v. *Hickeringill,* 11 East 574, 103 Eng. Rep. 1127 (1707).

Even in the case of competition that is wholly "unlawful" because prohibited by a licensing statute, an authorized competitor may maintain an action only if the statute was specifically enacted to protect licensees rather than the general public, *compare Frost* v. *Corporation Comm'n,* 278 U.S. 515, 521, 528 (1929), *with New Hampshire Bd. of Registration* v. *Scott Jewelry Co.,* 90 N.H. 368, 9 A.2d 513, 517-19 (1939), and, in any event, such statutes give rise to no cause of action by one competitor for unfair or unethical competition by another licensed competitor.

(9th Cir. 1975). The legislative history emphasizes this point repeatedly:

> "The investor is lost somewhere in the shuffle. This is our concern and our only concern."[10]

The Senate committee report expressly states that the "bill is designed to require full and fair disclosure *for the benefit of investors.*" SENATE REPORT 3 (emphasis added).

Not only are the "public shareholders" of the target company the sole class "for whose *especial* benefit the statute was enacted," *see Cort* v. *Ash*, 422 U.S. at 78, but implication of a cause of action for damages by a contestant for control is without support in the language of the statute and would be incompatible with its basic purpose.

Section 14(e), which was derived from and is analogous to § 10(b) of the 1934 Act and Rule 10b-5, by its language extends protection to the shareholders of the target company. While § 10(b) applies "in connection with the purchase or sale of any security," § 14(e) applies "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposi-

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[10] *Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 178 (1967) (hereinafter *"Senate Hearings"*) (Statement of the Chairman of the SEC). During the House hearing, the Chairman of the SEC further testified:

> "I would like to emphasize and reemphasize that the purpose of the bill . . . is a very simple one, solely to provide information to investors so that they can arrive at an informed investment decision. It is not designed to assist the offeror, nor designed to assist the management in resisting any plans put forward by the offeror. It is essentially based on the concept that the investor should have the information so that he can arrive at a decision."

Hearing on H.R. 14475, S.510 Before the Subcomm. on Commerce and Finance of the House Interstate and Foreign Commerce Comm., 90th Cong., 2d Sess. 17 (1968) (hereinafter *"House Hearing"*).

tion to or in favor of any such offer, request, or invitation."

The court below relied upon § 14(e)'s coverage of solicitations "opposing" tender offers as indicating that the opposed offeror was protected by the statute (A30). The inclusion of solicitations "in opposition to" a tender offer, however, was intended not to broaden the class protected, but to broaden the protection afforded the class—*i.e.*, to protect "security holders" against dishonest dissuasion as well as dishonest inducement, rather than to protect persons other than "security holders." SENATE REPORT 10-11; *see* pages 32-33, *infra*.[11]

Moreover, Congress explicitly disclaimed any intention to assist parties to a control contest, or to discourage takeover bids. SENATE REPORT 3; HOUSE REPORT 4; *House Hearing 1; see Rondeau* v. *Mosinee Paper Corp., supra* at 58-59.[12] Granting a cause of action for damages to a

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[11] In limiting causes of action under § 10(b) to purchasers or sellers of securities, this Court noted that the statutory wording "making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action" to any broader class than purchasers and sellers. *Blue Chip Stamps* v. *Manor Drug Stores, supra* at 733 n.5; *see id.* at 755-57 (Powell, J., concurring). The wording of § 14(e) would likewise be "badly strained" if construed to grant a cause of action for damages to anyone other than tender offerees—the class to whom the tender offer, and the solicitations favoring or opposing it, are addressed.

[12] The careful avoidance by Congress of the possibility that the corporate contestants might seek to utilize the statute as ammunition in their struggles reflected the concern of experts in the area, such as Professor Hayes of the Columbia Business School:

> "The two major protagonists—the bidder and the defending management—do not need any additional protection, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their interests. Rather the investor—who is a subject of these entreaties of both major protagonists—is the one who needs a more effective champion, and this is an important point."

Senate Hearings 57.

defeated offeror can only serve to discourage the making of competitive offers, which are inherently beneficial to the shareholders by providing alternatives and generally, as here, increasing the value they obtain for their shares.

The detriment to shareholders from allowing such actions, and the consequent further inconsistency with Congress' purpose, can be even more direct and blunt—as is the case here. If an unsuccessful contestant could recover damages from a victorious rival who has made an exchange offer, the shareholders of the target company who accepted that offer would have to bear part of the cost of paying the judgment. Thus, the Piper shareholders who accepted Bangor Punta's offer, who now hold Bangor Punta securities, who have never complained of any deficiency in the Bangor Punta registration statement, and who have unanimously rejected the rescission offer decreed below—these beneficiaries of the Williams Act would have to pay Chris-Craft for the privilege of having rejected its offer and accepted a better one!

In the only decision other than that below to allow a contestant to sue for damages, the First Circuit emphatically rejected such a result, which turns the statute on its head:

> "It follows . . . from the overriding investor-protection purpose of § 14(e) that damages should be denied to a tender offeror to the extent they are inconsistent with that purpose. The statute, in other words, may not be diverted from one designed to assist the investor to one operated principally to benefit one or another of the rival management or control groups jockeying for power."

H. K. Porter Co. v. *Nicholson File Co.*, 482 F.2d at 424-25.

Finally, granting a defeated contestant an implied action for damages under § 14(e) runs counter to the entire thrust of this Court's opinion in *Blue Chip Stamps* v. *Manor Drug Stores, supra.* The Court there cautioned against implying actions "for intangible economic injury such as loss of a noncontractual opportunity to buy or sell," where recovery would be "largely conjectural and speculative" and dependent "on the plaintiff's subjective hypothesis." 421 U.S. at 734-35. This is just such a case, as we discuss in detail in the later parts of this brief and as was recognized by the District Court after trial (A145-46):

> "In effect, Chris-Craft seeks the windfall of a punitive award against Bangor Punta by assuming the role of defender of the public interest in the purity of the registration process. This role has already been assumed by the Commission and we could well expect it to be assumed by exchanging Piper holders if there were material harm to them."

If a cause of action for damages by a defeated contestant for control is implied under § 14(e), lengthy litigation is the predictable result of every contest. The focus of such litigation will be not proof of wrongful conduct directed at the plaintiff but the discovery and pursuit of any colorable claim that third parties, even though not themselves injured, might have been "deceived." Such actions have no foundation in basic tort principles and, far from serving any public purpose, can only penalize and deter proper and beneficial commercial conduct, as losers in the market place seek windfalls through the courts.

B. Section 14(e) creates no liability with respect to prospectuses for registered exchange offers.

Apart from the general question of the standing of a contestant for control to sue for damages under § 14(e), Chris-Craft has no claim against First Boston because no private right of action on a registration statement should be implied under § 14(e).

The Court in *Blue Chip Stamps* expressly reserved the question "whether an implied action under § 10(b) of the 1934 Act and Rule 10b-5 will lie for actions made a violation of the 1933 Act and the subject of express civil remedies under the 1933 Act." 421 U.S. at 752 n.15. This case presents the analogous question as to § 14(e), and, however the question may be answered as to § 10(b), the answer here is plainly, "No."

As discussed above and by the Court in *Rondeau*, the basic purpose of the Williams Act was to require adequate and honest disclosure in connection with cash tender offers, which were unregulated by prior statutory provisions. SENATE REPORT 2.[18] Registered exchange offers, of course, are and have been since 1933 subject to the stringent substantive requirements of § 11 of the 1933 Act and to express private actions created by that section and § 12(2) of the 1933 Act.

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[18] Under the heading "Inadequacy of Present Law," the Senate Report stated:

> "The failure to provide adequate disclosure to investors in connection with a cash takeover bid or other acquisitions which may cause a shift in control is in sharp contrast to the regulatory requirements applicable where one company offers to exchange its shares for those of another. . . ."

Congress was well aware of the law pertaining to registered securities offerings when considering the Williams Act and was satisfied that it was adequate. Consequently, the initial drafts of § 14(e) excluded exchange offers from its coverage. S.510, § 1 (4)(A) at *Senate Hearings* 8. This exemption was eliminated in the final version of the Act *for the sole purpose* of applying § 14(e) to "those who wish to oppose the [registered] tender offer or who volunteer to assist the tender offeror." *Id.* at 28; *see id.* at 29; *House Hearing* 18.[14]

Thus, Congress did not intend to create new legal rights and duties with respect to disclosure in registered exchange offers. *Senate Hearings* 1, 28, 201:

> "The primary purpose of this proposal, as indicated in the Commission's memorandum, was to subject to regulation under the bill solicitations in favor of or in opposition to such a tender offer by

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[14] The Chairman of the SEC testified before the Senate Subcommittee:

> "We recommend that the exemption provisions of the bill be amended to eliminate the exemptions for acquisitions—principally stock-for-stock tender offers—made by means of a registration statement under the Securities Act of 1933. We believe that the provisions of this bill would be a useful adjunct to the disclosure provisions of the 1933 act in assuring fair treatment of tendering shareholders and permitting control of solicitations in opposition to the tender offer. This is the real key to it. They [sic] way the statute is drawn, where there is a registration statement with respect to the tender offer, it can be argued that there is no jurisdiction with respect to those who wish to oppose the tender offer or who volunteer to assist the tender offer."

He further stated that the exchange offer exemption should be removed to allow the SEC to "deal with someone who wishes to oppose the stock for stock tender but who would not be subject to the registration provision of the 1933 act." *Senate Hearings* 28, 29.

> the management or third persons. We recognize that the registration statement provides sufficient disclosure to persons to whom the tender offer is made. . . ." *Id.* at 201.

In § 11 of the 1933 Act, Congress expressly and carefully specified the parties responsible for prospectuses and the scope of their respective liabilities. A year later, § 11 was amended so as further to confine the degree of an underwriter's potential liability because Congress concluded that the original provisions, though limited, were not limited enough. Congress considered this amendment the "most important" of the 1934 amendments to the 1933 Act, *see Blue Chip Stamps* v. *Manor Drug Stores, supra* at 741, 753, and § 11's limitations have been strictly enforced by the courts, *see Barnes* v. *Osofsky*, 373 F.2d 269 (2d Cir. 1967).

The Court recognized in *Blue Chip Stamps* that it "would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736. Chris-Craft is not protected by the express bounds of § 11 and thus should not be afforded an implied cause of action on a registration statement under § 14(e). Indeed, with the recognition in the legislative history that the new act was not intended or needed to regulate disclosure in registered exchange offers, § 14(e) should not be construed as affording a cause of action to anyone on a registration statement. The remedy there is provided by the express provisions of the 1933 Act and only by those provisions.

POINT II

The affirmed findings that Bangor Punta and First Boston acted in good faith preclude liability under § 14(e).

A. An intent to deceive or defraud is required for liability under § 14(e).

In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), the Court fully considered the degree of culpability required for private damage liability under § 10(b), the principal antifraud provision of the 1934 Act, and Rule 10b-5 promulgated thereunder. In light of the history and purpose of the section and the rule, and their relation to the whole of the securities laws—including the express civil liability provisions of the 1933 Act with their "carefully drawn procedural restrictions," *id.* at 1389—the Court concluded that an "intent to deceive, manipulate, or defraud" is an essential element of liability in such an action. *Id.* at 1381.

The holding of *Ernst & Ernst* is squarely applicable to damage actions under § 14(e). As noted above, the language of § 14(e) was modeled after Rule 10b-5 and was intended to apply the same standards to tender offers as § 10(b) and Rule 10b-5 had applied to completed securities transactions.[15]

The prohibitory language of § 14(e) follows that of subsections (2) and (3) of Rule 10b-5, with only the distinction that where Rule 10b-5 makes it unlawful "to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any

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[15] The final committee reports in both the Senate and the House of Representatives entitled § 14(e) the "fraudulent transactions" provision. SENATE REPORT 10; HOUSE REPORT 11.

person," § 14(e) makes it unlawful "to engage in any fraudulent, deceptive, or manipulative acts or practices." Every court that has considered § 14(e), including each of the courts below in this case (A34, 134), has concluded that the required degree of culpability for damage liability under the two sections is identical. *E.g., Herbst* v. *International Telephone & Telegraph Corp.*, 495 F.2d 1308, 1313 n.11 (2d Cir. 1974); *White* v. *Abrams*, 495 F.2d 724, 732 (9th Cir. 1974); *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 606 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424-25 (1st Cir. 1973); *Ronson Corp.* v. *Liquifin A. G.*, 483 F.2d 846, 848-49 (3d Cir. 1973), *cert. denied*, 419 U.S. 870 (1974); *Gulf & Western Industries* v. *Great A. & P. Tea Co.*, 476 F.2d 687, 696 (2d Cir. 1973); *Iroquois Industries* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969).[16]

Thus, "an intent to deceive, manipulate, or defraud" is essential for liability in a cause of action predicated on § 14(e).

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[16] The SEC argued in *Ernst & Ernst* that the language of subsection (2) of Rule 10b-5, proscribing material misstatements and omissions, encompassed purely negligent conduct. 96 S. Ct. at 1390. The Court rejected such a construction on the grounds that it was inconsistent with the administrative history of the rule and that the rule could not rise above the statute in this respect. *Id.* at 1390-91. While the language of Rule 10b-5(2) is incorporated directly into § 14(e), rather than into a subsidiary administrative regulation, this is without decisional significance. The legislative history of § 14(e), like the administrative history of Rule 10b-5, limits its scope to "fraudulent transactions," and Congress intended and the courts have uniformly held, as noted above, that § 14(e) is to be construed *in pari materia* with Rule 10b-5. This Court's controlling construction of Rule 10b-5 in *Ernst & Ernst* must therefore be applied to § 14(e).

B. Since Bangor Punta acted in good faith and without intent to deceive or defraud, First Boston cannot be held liable as an "aider and abettor."

The Court of Appeals acknowledged that an underwriter does not "make" the statements in a registration statement, but held that an underwriter could be "liable under § 14(e) as an aider and abettor of the issuer" if it were sufficiently culpable (A49-50).

An alleged "aider and abettor" cannot, of course, be liable unless the principal whom it assisted is liable.[17] The trier of fact found that the Bangor Punta registration statement was "unintentionally in error" and that Bangor Punta had acted in good faith and without any "improper purpose" (A143, D14), and these findings were affirmed by the Court of Appeals (A47, 97-98, 118-19). The Court of Appeals' determination that Bangor Punta could nonetheless be held liable under § 14(e) rested on its view that "intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws" (A47, *see* A33-37, 45).

The Court of Appeals' holding is clear error under *Ernst & Ernst*, and as fully discussed in Point II of Bangor Punta's Brief, the good faith, unintentional nature of Bangor Punta's conduct—recognized by the Court of Appeals itself to

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[17] "Aiding and abetting" is a criminal law concept employed by some courts in civil cases under the securities laws. The concept is rooted in a concern that one actively assisting a primary wrongdoer shares responsibility for the wrong. *See, e.g., Landy* v. *FDIC*, 486 F.2d 139, 162-64 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). In *Ernst & Ernst* v. *Hochfelder*, this Court noted but reserved decision on the question "whether civil liability for aiding and abetting is appropriate under" § 10(b) and Rule 10b-5. 96 S. Ct. at 1380 n.7.

be at most an error in judgment (A48)—precludes liability to Chris-Craft.[18]

A fortiori, First Boston cannot be liable as an "aider and abettor" of Bangor Punta.

C. First Boston's own good faith and lack of intent to deceive or defraud also prevent its being held liable.

Even if the Court of Appeals had not erred in holding Bangor Punta liable, and even if it were also clear that civil liability for "aiding and abetting" is appropriate under § 14(e), *see Ernst & Ernst* v. *Hochfelder, supra* at 1380 n.7, the decision against First Boston would have to be reversed.

Aside from its fundamentally mistaken standard of culpability, the Court of Appeals committed a threshold error of analysis by considering First Boston's position in terms of its role as an "underwriter," the importance of the "underwriter" in the issuance of securities and the "duty of due diligence" imposed upon an "underwriter" (A51-55). "Underwriter" is a technical term under the 1933 Act, which deals principally with new issues, and the term appears neither in § 14(e) nor in any other substantive provision

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[18] The question left open in *Ernst & Ernst* of "whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5" as "a form of intentional conduct," 96 S. Ct. at 1381 n.12, is not presented here. The Court in *Ernst & Ernst* indicated that a finding of "good faith" precluded liability under the standard it enunciated: "There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith." 96 S. Ct. at 1387.

It is similarly well-established at common law that an "unintentional" error made in "good faith" can never be "recklessness" that is the functional equivalent of "intentional conduct." *Derry* v. *Peek,* 14 App. Cas. 337, 374 (1889) (good faith precludes recklessness; an action for deceit will not lie for a misrepresentation made "with an honest belief in its truth," however unreasonable); L. Green, *Deceit,* 16 VA. L. REV., 749, 752-53 (1930).

of the 1934 Act, which basically applies to trading in outstanding securities. The duties and liabilities of an underwriter *qua* underwriter are fixed by § 11 of the 1933 Act and run only to purchasers of the newly registered securities, a class not including Chris-Craft. To equate nonfeasance in the form of a failure to carry out the special § 11 duties of an underwriter with such active misconduct as to make one an "aider and abettor" of "fraud" simply cannot be done.[19]

The Court of Appeals held that First Boston, as an underwriter, would be "sufficiently culpable" (A36) to be liable under § 14(e) "as an aider and abettor" of Bangor Punta if it either had been "aware of a material falsity in the registration statement or was reckless in determining whether material falsity existed" (A49).

In applying this standard, after a discussion devoted solely to First Boston's "investigation," the court held that "First Boston possessed enough information reasonably to deduce that the [Bangor Punta] registration statement was materially inaccurate" in "carrying the BAR at $18.4 million" (A55). This holding can only mean that First Boston's knowledge of the prior BAR discussions should have led First Boston to conclude that Bangor Punta and its independent auditors, who certified the balance sheet, were presenting materially false financial statements unless they wrote down the carrying value of the BAR *and* that First Boston should have seen this so clearly as to insist upon the accountants' accepting First Boston's conclusion. First Boston, acting in "good faith" and with

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[19] Regardless of how it may be camouflaged by phrases such as "far beyond mere negligence" and "an almost complete abdiction of its responsibility" (A54 n.24, A55), to impose liability under § 14(e) because of a failure to perform § 11's duty of due diligence is to incorporate § 11's simple negligence standard into § 14(e) and thereby to nullify § 11's carefully drawn balance. *See Ernst & Ernst* v. *Hochfelder, supra* at 1388-89; *see also* note 17, page 36, *supra.*

the assistance and advice of experienced counsel, of course reached no such conclusion.

To thus impose liability upon investment bankers for failing to draw the same conclusions from given facts as a court later draws from those facts—though the bankers proceeded in good faith and the other competent professionals involved in the situation also failed to reason as the court later did—not only dispenses with the wrongful intent required under *Ernst & Ernst* but approaches a doctrine of absolute liability. *Cf. Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n.20 (2d Cir. 1973) (Friendly, C.J.).

As to diligence in "investigation," the court recognized that First Boston had read the relevant Board minutes, had questioned Bangor Punta officials about the BAR, and had learned of the June 3 decision to "table" the question of a sale pending lengthy legal and accounting investigations (A51-54, *see* A50). The court criticized First Boston, however, for not seeking "verification" of what management had said—that there was no plan to sell the BAR at the time—by making "a more careful search of [Bangor Punta's] records" and talking "to officials at [the prospective purchaser]" (A54-55).

The court in no way suggested that what First Boston had learned from Bangor Punta's minutes and officials was wrong in any respect *nor* did it indicate what critical additional information First Boston would have discovered by a further "search" of files or conversations with the prospective purchaser.[20] The simple fact is that

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[20] The only additional Bangor Punta document mentioned in the court's recitation of the facts is an unexecuted draft letter of intent that antedated the June 3 decision to "table" the matter and that the Board had *declined* to approve (A44). Likewise, as to conversations with the officials of the prospective purchaser, the court itself noted that they had been told exactly what First Boston was told—that the matter had been tabled pending lengthy study (*ibid.*).

First Boston's investigation was entirely adequate and there was no hidden critical fact to be found. First Boston and its counsel reached exactly the same conclusion at the time as was later reached by the District Court after a full trial—that sale of the BAR pursuant to the offer that had been received was not a "reasonable probability" at the time of the exchange offer (D13). In sum, First Boston did all that was necessary, even by hindsight, and could have learned nothing more affecting the registration statement.

Finally, as to the whole question of basing liability on the carrying value of the BAR on Bangor Punta's balance sheet, we return again to the fact that the preparation and presentation of the financial statements in the prospectus were the responsibility not of First Boston but of Bangor Punta and of its independent auditors. The auditors, Peat, Marwick, Mitchell & Co., with full knowledge of the BAR matter, certified the balance sheet and consented to the inclusion of their opinion as experts in the registration statement. Even under the stringent liability provisions of § 11 of the 1933 Act, First Boston was entitled to rely upon their opinion so long as it acted in good faith, and such reliance certainly cannot be deemed culpable conduct under a statute regarded by Congress and recognized by the Court of Appeals itself as an "antifraud" provision (A26).[21]

The District Court in its decision after trial stated that it "cannot find" that First Boston "committed, or engaged in any course of conduct which operated as fraud or deceit

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[21] Even if the court's view of the accounting question were correct, the point is, to say the least, far from clear, and certainly not one of basic principle. Judge Mansfield recognized that book value "is not viewed in the financial world as the equivalent of market value" or "current liquidating value" and that a write-down of the BAR might have been "speculative and possibly misleading" (A122-23).

upon Chris-Craft or the public shareholders of Piper" (A158). "Indeed," the court stated, "were the record to support Chris-Craft's claim with respect to . . . Bangor Punta (which it does not) the Court would be hard put to find any basis for extending liability to . . . First Boston" (*ibid.*).

On an objective reading of the facts, First Boston, which "acted solely" in "good faith" (A159), bore no responsibility for the disclosure deficiency found by the courts below and would have had no liability to anyone therefor even under a negligence standard. Clearly, under the standard of culpability required by *Ernst & Ernst* there is not even an arguable question as to First Boston's liability to Chris-Craft.

POINT III

The Court of Appeals' presumption of causation was error, and Chris-Craft's claim for damages must be denied for failure to prove causation.

Chris-Craft adduced no evidence that the omission from the Bangor Punta prospectus of the BAR sale possibility was consequential to the success of Bangor Punta's exchange offer, *or* that the success of the exchange offer was determinative of the contest for control (A145). The District Court therefore held that Chris-Craft had failed to establish an essential element of an action for damages—"a causal relation between the deficiency and the harm complained of" (A144).

The Court of Appeals rejected as "unduly burdensome" (A59) the requirement that Chris-Craft establish "a reasonable probability that its defeat and damage were con-

nected with the claimed violations" (A145). Instead, the court held that "the *Mills-Ute* test" required it to *presume* that the Bangor Punta exchange offer would have been wholly unsuccessful had the BAR situation been disclosed and then went on to *presume* that Bangor Punta would not have achieved control but for the success of its exchange offer (A60).

The Court of Appeals' application of its *"Mills-Ute* test" to this damage action by an undeceived, nonrelying third party is wholly inconsistent with this Court's decisions, and equally inconsistent with the facts.

In *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, 385 (1970), this Court held that preservation of "corporate suffrage" requires a limited presumption of causation in actions by shareholders challenging materially deficient proxy statements addressed to them by management. In such cases causation of injury is sufficiently shown if it is proven that "the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." The Court cautioned, however, that this presumption "implies nothing about the form of relief" to be afforded, which was to be determined by the application of traditional standards. *Id.* at 386-89.

Mills thus merely recognized that corporate shareholders are legally injured when management calls upon them to act upon a materially deficient proxy statement, whether or not the proposal to which the statement relates is itself fair and desirable. If similar considerations are at all applicable here, they have been given full effect by the District Court's order in the SEC action requiring Bangor Punta to make a rescission offer to the tendering Piper shareholders, an offer that was duly made and not accepted by a single shareholder.

Mills in no way suggests that a third party such as Chris-Craft can recover damages on the basis of *presumed* reliance by the shareholders of another corporation on an allegedly deceptive statement by still another third party. Even in the case of persons complaining of deficiencies in statements addressed directly to them, *Mills* has no application outside the proxy context as a basis for recovery of damages under the 1934 Act. As explained by Judge Adams, "In such case, reliance and culpability form crucial ingredients in the cause of action, and the equation in *Mills* of materiality with causation and reliance becomes inapplicable." *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 289 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).[22]

The *Ute* half of the Court of Appeals' "*Mills-Ute* test" likewise has nothing to do with the facts of this case. In *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), the economic injury of those deceived was indisputable, the deceit was indisputable, traditional privity was present, and those defrauded had obviously relied upon the defendants, who stood in a fiduciary relationship to them.

Here, on the other hand, Chris-Craft was not deceived and there was no economic injury to those allegedly deceived—after announcement of the subsequent BAR sale,

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[22] Judge Adams' full statement is as follows:

> "The thrust of the proxy rules is to ensure that shareholders receive accurate information by enabling objectors to a proxy statement to enjoin the distribution, or voting of proxies, or action taken pursuant to the vote, early in the process, while it is still relatively easy to correct the defect. Accordingly, it is appropriate that reliance and culpability not be essential independent elements of a Section 14(a) action. While the main thrust of Section 10(b) is to achieve the same goal, it does so by the significantly different method of prescribing penalties, civil and criminal, for the dissemination of false and misleading statements. In such case, reliance and culpability form crucial ingredients in the cause of action, and the equation in *Mills* of materiality with causation and reliance becomes inapplicable."

Bangor Punta's shares went up. Here there is no privity; none of the defendants stood in a fiduciary relationship to Chris-Craft, and Chris-Craft in no way relied on any of them to look after its interests.

Mills and *Ute*, in short, simply have no relevance to this case.

The facts, moreover, do not sustain—indeed, they contradict—the Court of Appeals' presumptions that the BAR omission accounted for the success of the exchange offer, and that Bangor Punta would not have won the contest but for the exchange offer.

Upon the sale of the BAR in October 1969, the market reacted to it as a "bullish" development (App. 591), indicating that, had it occurred earlier and been disclosed, it would have had no negative impact on the exchange offer. Further, Bangor Punta actually acquired control not through the exchange offer but by cash purchases in the market thereafter. Had the exchange offer failed completely, Bangor Punta, which began those purchases immediately after the offer, could have kept on making cash purchases until it reached its goal of 51%.[23]

Conversely, the success of Bangor Punta's exchange offer did not *cause* Chris-Craft to fail in its quest for control. Chris-Craft deliberately halted its cash purchases after it failed to gain the upper hand in court—it "withdrew from the battle" and left the field to Bangor Punta.

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[23] The Court of Appeals apparently considered it of crucial significance that Bangor Punta "eventually acquired only about 51% of the outstanding shares"; the court said that this bare majority position made it "clear" the 7% acquired through the exchange offer "was critical" to Bangor Punta's success (A60). The record provides no basis, however, for concluding that Bangor Punta could not have acquired for cash the 7% it had obtained on the exchange offer, or for concluding that, had it wished, it could not have acquired more than a 51% interest through continued cash purchases. Bangor Punta stopped buying at 51% because it needed no more for control.

When the whole course of the contest for control is viewed it is clear that none of the acts of any of the defendants that the Court of Appeals considered injurious to Chris-Craft in fact caused it injury:

The January letters and Grumman announcement by the Pipers (see pages 4-5, *supra*) did not keep Chris-Craft from obtaining more than the 300,000 shares that were its stated objective in its cash tender offer (A135-38; *see* A113-16). The Grumman deal was terminated in mid-March, but even then Chris-Craft did not seek additional shares for cash—the shares it claims would have been tendered to and purchased by it for cash in early February but for the Pipers' letters and announcements. Rather, Chris-Craft, despite its purported cash reserves and alleged willingness to make cash purchases, kept on with the lengthy process of making a registered exchange offer.

The shares purchased for cash by Bangor Punta in mid-May would have been just as readily available to it in mid-August, after its exchange offer. And those shares were just as available to Chris-Craft before it filed its exchange offer at the end of February—had it been willing to pay the price.

After all these events, both Chris-Craft and Bangor Punta remained in position to gain control, and their relative positions were left unchanged by their respective exchange offers. In the end, it was cash purchases of Piper stock in the market that determined the contest—cash that Bangor Punta committed and that Chris-Craft did not.

In sum, causation in fact was not proven and did not exist. Whatever the reasons for Chris-Craft's defeat—a lack of funds, a failure of will, a hope to reap greater rewards through litigation—it was not caused by any of the claimed "violations."

POINT IV

The Court of Appeals' damage award is erroneous in concept and infected with multiple error; no damages are warranted, but if any are granted, the award made by the trier of fact should be reinstated.

A. Even assuming Chris-Craft has an action for damages and has established the essential elements required for recovery, no damages should have been awarded against First Boston.

The SEC obtained full equitable relief for the benefit of Piper shareholders in the form of a rescission offer. Bangor Punta has carried out that decree according to its terms and has thereby cured any legal injury connected with the omission from the registration statement of the BAR sale possibility.

Moreover, Chris-Craft itself obtained from the Court of Appeals additional, substantial equitable relief in the form of an injunction precluding Bangor Punta for five years from voting both the 7% of Piper's shares it purchased in mid-May 1969 and the 7% it acquired through the exchange offer.

Thus full, truly extraordinary, equitable relief has been granted for the direct benefit of shareholders *and* for the direct and indirect benefit of Chris-Craft. Any judgment for damages against First Boston would constitute duplicative recovery, going far beyond repairing any injury conceivably done by First Boston to anyone.

B. The Court of Appeals' second measure of damages was not related to the injury it presumed Chris-Craft had suffered.

If damages are to be awarded at all, the judgment of the trial court—resting upon the trier of fact's application

of the Court of Appeals' direction to determine the loss resulting from the alleged reduction in Chris-Craft's opportunity to gain control—should be reinstated. The damage award fixed by the Court of Appeals is infected with multiple errors of great magnitude, including the fact that it cannot be squared with its own determination of the nature of Chris-Craft's "injury."

Chris-Craft's presumed injury was the reduction of its chances for success: "We cannot say that [Chris-Craft] would have obtained a majority of Piper stock had [Bangor Punta] not violated the law," but "[Bangor Punta's] unlawful conduct denied [Chris-Craft] a fair chance to compete for control of Piper" (A66, B26). After the trial on damages, the District Court found that this opportunity, measured pursuant to the Court of Appeals' mandate by "the reduction in appraisal value" of Chris-Craft's Piper stock as a result of Bangor Punta's achieving control, was "generously" fixed at $2.40 per share (B70).

The Court of Appeals then substituted a new rescission measure of damages—purchase price less a hypothetical sales price—so as to treat Chris-Craft like a defrauded investor.[24] Looking to the record to implement its formula, the Court of Appeals found that one witness testified that the Piper securities held by Chris-Craft could not have been sold for five months and that, because of a significant general decline in the securities markets during the five-month period, the Piper shares, which Chris-Craft still holds, hypothetically might have brought as little as $27 per share, after expenses, had they been sold then. The

[24] Rescission is a contractual remedy. *See generally Myzel* v. *Fields*, 386 F.2d 718, 741-42 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). Chris-Craft's claim is in tort.

Court of Appeals subtracted that hypothetical $27 from the average purchase price plus expenses ($64), and set damages at $37 per share, or $25,793,365. (B29-31)

The Court of Appeals recognized the uncertainties in its determination, since Chris-Craft had not shown any elements of causation, but termed the trier of fact's award of $1,673,988 "quite insubstantial" and emphasized that the risk, including market fluctuations, had to be borne by the wrongdoer (B17, 26-27, 30).[25]

The new measure of damages developed by the Court of Appeals was applied by hypothesis and speculation, and, in concept, bore no rational relationship to the value of Chris-Craft's "lost opportunity" to gain control of Piper, which the trier of fact found to be $2.40 per share.

C. The award improperly included "damage" caused by market decline.

The District Court found the fair market value of Piper stock was $48 per share on September 5, 1969, when Bangor Punta acquired control (B57, affirmed, B27). The portion of damages thus resulting from market decline is $21 per share ($48 minus $27, the value five months later as fixed by the Court of Appeals), which totals, before prejudgment interest, $14,647,395.

Section 11 of the 1933 Act expressly precludes damages in connection with misstatements in registration statements that represent "other than the depreciation in value of such security resulting from" the error. This pro-

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[25] Commentary on the award has pointed out that this reasoning "conflicts with the notion that the courts are to remain neutral as between the contestants to the tender offer," and is "frighteningly punitive," "especially considering that [Chris-Craft] had no assurance of success." *Survey of 1974 Securities Law Developments,* 32 WASH. & LEE L. REV. 719, 788 n.86, 789 (1975).

vision precludes damages based on a decline in the value of a security due to other causes, including a general market decline. *Feit* v. *Leasco Data Processing Equip. Co.*, 332 F. Supp. 544, 586 (E.D.N.Y. 1971).[26]

Section 11 was amended with passage of the 1934 Act expressly to eliminate a prior rescission remedy and to avoid damages due to a general decline in the market or other causes unrelated to the ground of a defendant's liability.[27] The express liability provisions in the 1934 Act

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[26] The Court in *Feit* held that § 11 prohibited it from considering "any damages caused, not by defendants' omissions, but by independent forces," concluding that:

> "some portion of the diminution of [the] price was due to market factors which would have affected any security and . . . to that extent, plaintiff's damages were not 'caused' by the omissions in the registration statement."

Ibid.; see also Fox v. *Glickman Corp.*, 253 F. Supp. 1005, 1010 (S.D.N.Y. 1966).

[27] Section 11(e) as originally enacted expressly provided a rescission measure of damages, such as that utilized by the Court of Appeals here. 48 Stat. 83.

According to Senator Fletcher, the Chairman of the Banking and Currency Committee, the amendments to § 11(e) that, *inter alia*, eliminated this provision were "the most important of all" the amendments to the 1933 Act passed with the 1934 Act. 78 Cong. Rec. 8185 (1934).

Senator Byrnes, in discussing these amendments, also emphasized this point:

> "The provisions of the Securities Act of 1933 which have caused the greatest complaint are those as to the civil liability of underwriters and of the officers and directors of corporations on account of false statements in the registration statements filed by corporations. . . .
>
> "Under the existing law, the plaintiff is entitled to recover the amount of the loss suffered by him as a result of the purchase and sale of the security. Under the new law, the defendant will have the right to show whether a part of the plaintiff's loss is due to some cause other than the untrue statement, and to such extent will be able to reduce the amount of the recovery by the plaintiff."

Id. at 10185-86 (1934). *See also* Comment, *Amendments to the Securities Act of 1933*, 32 MICH. L. REV. 1130, 1136 (1934).

provide similar limitations.[28] It would be anomalous indeed to treat one in Chris-Craft's position more favorably than those to whom an exchange offer is made and who rely on it and accept it.

Moreover, § 28(a) of the 1934 Act prescribes that no person shall recover damages under the 1934 Act "in excess of his actual damages on account of the act complaint of," and the legislative history of the 1934 Act shows plainly that market decline was not considered to be "on account of" a misleading statement.[29] When § 28(a) is read against that background and *in pari materia* with § 11, which expressly precludes such awards in actions on registration statements, the implicit holding to

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[28] For example, § 18 of the 1934 Act, 48 Stat. 897, as amended, 49 Stat. 1379, 15 U.S.C. § 78r, as originally introduced (as § 17) provided a rescission measure of damages, which, by requiring that damages be based on the lowest market price in a 90-day period, took into account loss caused by general market decline. *Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.) Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6431 (§ 17) (1934). After much objection in the hearings that damages should be only those actually caused by the misstatement, this provision was eliminated and § 18 was changed to provide for damages on the transaction only if the "price . . . was affected by such statement" and only "for damages caused by such reliance." *See id.* at 6939; *Hearing on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 226, 307, 489 (1934):

"A misleading statement might affect the value of the security to the extent of $1 and the market on the security might drop $50, due to other causes. The man who caused the loss of the dollar might fairly be held to pay that loss but to hold him accountable for the whole fluctuation of the market seems fantastic."

Statement of John M. Hancock, *id.* at 489.

[29] *See* note 28, *supra*.

the contrary in this case is, as recognized by the Government, clear error.[30]

D. The Court of Appeals acted improperly in awarding prejudgment interest on its $25 million damage award.

In "affirming" the award of prejudgment interest, the Court of Appeals increased the award by almost $10 million. As recognized by this Court, the award of prejudgment interest is based on considerations of equity and fairness, *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962), and is a matter within the peculiar province of the trial court, which must consider, among other things, the quantum of damages in determining the equities of a grant or denial. *See, e.g., Norte & Co.* v. *Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). The "affirmance" increasing interest from $600,000 to almost $10 million was a usurpation of the trial court's discretion.

E. The defendants should not have been held jointly and severally liable.

The Court of Appeals directed that liability be imposed "jointly and severally," although First Boston was

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[30] The Government, in its brief opposing certiorari, at 23 n.14, acknowledged that market decline should not have been included in damages, and, citing evidence in the record that the realizable value of Piper shares at the time Bangor Punta gained control was between $41.60 and $43.50 (*see* B29), concluded that the damages due to market decline were $15 per share. But the Court of Appeals expressly upheld the trial court's finding that the fair value at that time was $48, which was arrived at by averaging the experts' figures (including a $44-46 figure of the expert cited by the Government (B 56)). The discount between "fair market value" and realizable value (i.e., after expenses of sale) according to that expert is thus approximately $2.50 per share. To the extent that the $27 figure resulted from the deduction of such hypothetical expenses of sale, this portion, like the market decline, is error, since expenses are always incidental to sale and, in any event, Chris-Craft never sold. The total error in fact was the $21 per share referred to at page 48 above.

not held liable for other violations held to have been committed by the other defendants. At common law, the liability of tortfeasors who independently harm a plaintiff is not joint and several unless the plaintiff suffers an indivisible single harm. *See* W. PROSSER, THE LAW OF TORTS 320-21, 315-16 (4th ed. 1971).

The Court of Appeals here held that Chris-Craft's injury was not that the violations caused it to lose the contest, but that each violation further deprived Chris-Craft of the opportunity to compete in a fair contest (A66). Thus, as multiple polluters are uniformly held not jointly liable for the entire pollution of a stream, but only for the increment they caused, W. PROSSER, *supra* at 317; RESTATEMENT OF TORTS § 881 (1939), the defendants in the present case should not have been made jointly liable for the separate acts that the Court of Appeals thought had tainted the purity of the contest.

As discussed above, § 11(e) of the 1933 Act requires that the damages awarded "result from" the particular error or omission found, and § 28(a) of the 1934 Act requires that damages be "on account of the act complained of." Under § 11(f) of the 1933 Act First Boston and Bangor Punta might be held jointly and severally liable for the BAR omission, but § 11(e) indicates that First Boston should not be liable jointly to the extent the damages did not "result from" the BAR omission. Especially when damages are highly speculative, as here, apportioning liability among unrelated acts comports with both congressional intent and the basic principle of the common law that liability should be imposed only to the extent the damages were caused by the defendant's wrongful act.

F. The award against First Boston contravenes express congressional policy.

Because § 11 as originally passed caused a substantial disruption in the capital formation process, Congress in passing the 1934 Act amended the statute to limit the damages recoverable thereunder in several respects. *See Blue Chip Stamps* v. *Manor Drug Stores, supra* at 753-54.[81]

The liability of an underwriter was limited specially—to the "total price at which the securities underwritten by him and distributed to the public were offered to the public." *See id.* at 740-41.[82]

With interest, the award here totals almost five times the total price of the securities underwritten by First Boston; it also is more than 900 times First Boston's $40,000 fee, and half its net worth.

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[81] Senator Gore, speaking of this proposed amendment to the 1933 Act, stated:

> "About 1 year ago the Securities Act was passed. It was predicted by many, and feared by some of us, that the Securities Act would serve as a brake upon the wheels of recovery. We feared that the measure was too stringent; that it was too rigorous; that it would seal up the sources of capital. Few, I believe, will now deny that those fears have come true. I believe that the Chairman of the Banking and Currency Committee has introduced an amendment seeking to liberalize the terms of the Securities Act and to facilitate long-time [sic] financing and refinancing in this country."

78 Cong. Rec. 8576 (1934).

[82] The amendment to § 11(e) embodies a deliberate policy decision by Congress, and was characterized by Senator Fletcher, in introducing it on the floor of the Senate, as "the most important of all" the amendments to the 1933 Act adopted with passage of the 1934 Act:

> "Amendment to Section 11(e): This amendment is the most important of all . . . it provides that an underwriter who does not receive any preferential treatment is permitted to limit his total liability for all suits brought under section 11 to the extent of the public offering price of the securities which he underwrote."

78 Cong. Rec. 8185 (1934).

The imposition of damages upon a 1933 Act underwriter in excess of the statutory limitations of § 11 blatantly contravenes the strong, express intent of Congress, even if it were proper to imply an action on a prospectus under the 1934 Act in favor of a party who cannot sue under the 1933 Act. *See id.* at 752 n.15. The decision below, which both expands the class to whom the underwriter is liable and disregards the express congressional limitations on liability, creates precisely the sort of liability that Congress sought to avoid and that was disapproved in *Blue Chip Stamps*. *See also Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179-80, 174 N.E. 441, 444 (1931) (Cardozo, C.J.); Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 58 VA. L. REV. 776, 840-43 (1972).[33]

In no event should First Boston's liability have been fixed at an amount larger than the "price" of the securities issued pursuant to the Bangor Punta registration statement, about $8 million.

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[33] The special limitation on an underwriter's liability continues to be of crucial importance to the industry and to Congress. A proposed amendment to the 1934 Act now pending before Congress, the "Municipal Securities Full Disclosure Act of 1976," S. 2969, includes an absolute limitation on an underwriter's liability similar to that of § 11:

> "(g) In no event shall any underwriter of an issue of municipal securities . . . be liable in, or as a consequence of, any suit for damages in excess of the total price at which the issue was sold by it to the public."

See 122 Cong. Rec. S.1636 (1976). This bill, drafted by the SEC, was introduced by Senator Williams, the sponsor of the Williams Act, which, as indicated earlier, was not intended to impose any liability upon underwriters. The section-by-section analysis of the bill, which is intended to regulate the distribution of municipal securities exempt from registration under the 1933 Act, states that it will extend the coverage of "the general anti-fraud provisions" of the 1934 Act to such distributions. *Ibid.* Thus, even though an underwriter will be subject to liability only if found to have had an "intent to deceive," a finding not required for liability under § 11, his liability will nonetheless be limited.

In sum, the Court of Appeals erred in its formulation of damages: by including in its award an amount representing a general market decline, by imposing damages jointly and severally for separate torts, by awarding prejudgment interest on a principal amount vastly in excess of the award that prompted the District Court in the exercise of its discretion to add prejudgment interest, by ignoring the express statutory limitation on underwriters' liability, by substituting an inappropriate rescission measure of damages for the trial court's proper measure, and by awarding any damages when equitable relief had fully negated any unfair advantage gained by Bangor Punta.

Conclusion

For the reasons stated, the judgment should be reversed and the complaint dismissed.

Respectfully submitted,

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Addendum

Text of Statutes Involved

Section 14(e) of the Securities Exchange Act of 1934, 82 Stat. 457, as amended, 84 Stat. 1497, 15 U.S.C. § 78n(e), provides:

"(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a) of the Securities Exchange Act of 1934, 48 Stat. 903, 15 U.S.C. § 78bb(a), provides:

"(a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any

person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder."

In relevant part, Section 11 of the Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U.S.C. § 77k, provides:

"(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

* * *

(5) every underwriter with respect to such security.

* * *

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

* * *

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert . . . he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . .

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

* * *

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all

other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public."

FOR ARGUMENT

No. 75-354

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED WITH NOS. 75-353 AND 75-355

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-354

THE FIRST BOSTON CORPORATION,

Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED WITH NOS. 75-353 AND 75-355

FIRST BOSTON'S REPLY BRIEF

The Issues for Decision

Chris-Craft contends that the various petitioners, including First Boston, engaged in a sort of backroom conspiracy to deny it through "fraud" an otherwise inevitable victory in the contest for control of Piper. This was indeed Chris-Craft's contention at trial, but it was rejected by both courts below, and First Boston was held liable solely by reason of the nonpurposeful BAR omission from the Bangor Punta registration statement. Thus, Chris-Craft's presentation here is not based on the findings of fact that frame the legal issues for decision by this Court.

Both courts below rejected totally, as a factual matter, Chris-Craft's charges that First Boston was the sinister guiding force behind all the many wrongs claimed to have been done Chris-Craft. The District Court stated (A158-59):

> "On the basis of the record, the Court cannot find that [First Boston] committed, or engaged in any course of conduct which operated as fraud or deceit upon Chris-Craft or the public shareholders of Piper."
>
> * * *
>
> "First Boston, in its capacity as an investment banker, rendered a variety of professional services to Piper Aircraft Corporation, Bangor Punta and members of the Piper family. In each case, substantive decision making power rested with and was exercised by these clients and not First Boston."
>
> * * *
>
> "The record compels the conclusion that [First Boston] acted solely in the furtherance of what [it] believed in good faith to be the legitimate interests of [its] clients."

The Court of Appeals, although holding First Boston liable as an underwriter for the BAR omission, affirmed these findings (A55 n.25):

> "We agree with the district court that there is no merit to [Chris-Craft's] other claims against First Boston, essentially that it was the chief strategist for Piper and [Bangor Punta] in the control battle. The district court found, based on substantial evidence, that in its capacity as investment

> banker First Boston merely provided professional services to these companies. The business decisions that led to violations of the securities laws were initiated by these companies, not by First Boston in its role as investment banker. We are aware of no authority for holding First Boston liable in that capacity."

It is thus Chris-Craft, not First Boston, which seeks a "de novo trial" in this Court (see Chris-Craft Brief 5). Absent exceptional circumstances—and none exists or is even argued—the "concurrent findings" of the two courts below are not to be relitigated here. *E.g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

As the SEC recognizes in its brief *amicus curiae*, (SEC Brief 155-59 & n.365), the Court of Appeals held against First Boston only by concluding that it had not properly performed its special duty under § 11 of the 1933 Act as a statutory underwriter (A48-55). On this predicate, First Boston was rendered liable to Chris-Craft under § 14(e) of the 1934 Act. These legal conclusions and the means by which they were reached—not Chris-Craft's rejected claims of fraud and conspiracy—give rise to the important issues that the Court granted certiorari to review.

In discussing these issues, the SEC concludes that the judgment against First Boston as a § 11 underwriter must be vacated to the extent it awards damages in excess of § 11's prescribed maximum (SEC Brief 155-59 & n.365,

194). But that result is the very minimum required by construction of the securities laws as a coherent whole. A correct interpretation of § 14(e), in light of its legislative history and purpose and in light of the express limitations of § 11, requires complete reversal of the judgment of liability against First Boston: Chris-Craft has no right of action at all against First Boston as a § 11 underwriter ("standing"), and First Boston's conduct did not violate § 14(e) ("scienter").[1]

Further, Chris-Craft's simplistic pretense that causation was "a matter of mathematics" (Chris-Craft Brief 29, 79), among other deficiencies, ignores the basic question of whether the Court of Appeals was correct in *presuming* that, but for the BAR omission, not a single Piper shareholder would have accepted Bangor Punta's exchange offer (A60). The SEC avoids the issue in a different way: it endorses presumed causation for "liability" but not "damages," relying on *Mills* and *Rondeau*, and claims to take no position as to whether causation of "damages" has been established as a matter of fact (SEC Brief 145-48, 161-62).

The real causation question in this case is one of *injury* to Chris-Craft—not "liability" in the abstract. The *Mills* presumption simply has no application in determining whether Chris-Craft was in fact injured, and the District Court *found* that causation in fact was not proved (A144-47).

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[1]In the face of Chris-Craft's screed, it bears repetition that there was no finding or conclusion below that "fraud" in any sense was involved as to the BAR omission. Even the SEC, which continues generally to support Chris-Craft's position on liability, now implicitly acknowledges as much (*see* SEC Brief 155-59 & n. 365).

The judgment against First Boston is without factual or legal foundation, and is contrary to basic principles of civil law. It serves no manifest or conceivable congressional purpose, and can only injure the public interest in the proper functioning of capital markets. The wrong done First Boston is egregious.

I. Standing

Both Chris-Craft and the SEC go to great lengths to establish a proposition not at issue here: that judicial implication under § 14(e) of some private right of action —e.g., a damage action by a deceived public shareholder— is called for by legislative intent (Chris-Craft Brief 40-46; SEC Brief 74-78, 83-85). The issues for decision here are whether an action for *damages* by a *contestant for control* is created by § 14(e) under any circumstances and, if so, whether such an action lies against a 1933 Act underwriter on account of an alleged deficiency in a prospectus.

A. When Chris-Craft and the SEC finally approach the first of these issues, both rely on repetitive assertion, wholly unsupported by a single statement in the legislative history, that there was "unmistakable congressional intent to afford standing to all participants" in contested tender offers (Chris-Craft Brief 37).[2] They base this sweeping assertion primarily on the concern that was expressed by Congress that the *burden* of regulation imposed by the

[2] Every legislative reference cited by Chris-Craft and the SEC, when examined, either supports the contrary proposition or is irrelevant. For the convenience of the Court, First Boston has reproduced the legislative history of the Williams Act and lodged copies with the Clerk.

Williams Act "for the benefit of investors" should fall equally upon all parties to a control contest. *E.g.*, SENATE REPORT 3.

But equal allocation of the burdens and duties imposed by the Act was Congress' only concern as to contestants for control.[3] Congress showed no concern for protecting contestants, or for creating any rights in their favor—the rights which are corollary to the duties imposed upon contestants are the rights of the target company's shareholders. *E.g.*, SENATE REPORT 1, 2, 3, 4; *Senate Hearings* 178.[4] It is those shareholders, public investors, "for whose *especial* benefit" the Williams Act was passed. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[5]

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[3] Senator Williams stated:

> "Every effort has been made to avoid tipping the balance of *regulatory burden* in favor of management or in favor of the offeror."

113 Cong. Rec. 854 (Jan. 18, 1967) (emphasis added). Likewise, in an article cited several times by Chris-Craft, SEC Chairman Cohen stated:

> "The opponents in an opposed takeover bid would be placed on an equal footing. Each would be subject to equivalent disclosure and anti-fraud regulations."

Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAWYER 149, 153 (1966); *see House Hearing* 17.

[4] SEC Chairman Cohen stated, at *Senate Hearings* 178:

> "[T]he principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern."

[5] Chris-Craft (Brief 55) seeks to pass off this Court's controlling decision in *Cort* by announcing that it approved *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); this is quite true but also quite meaningless, since *Borak* granted standing to the very corporate shareholders "for whose *especial* benefit" § 14(a) of the 1934 Act was enacted, just as *Cort* requires.

In its zeal to urge the contrary, the SEC presents the astounding argument that Congress intended the Williams Act wholly to displace state law governing the rights and liabilities of competitors among themselves and to create a new federal law occupying that field.[6] This argument proves too much, for had Congress intended such a drastic step it surely would have made its will unmistakably clear, and the legislative history contains not a single statement to that effect. *Cf.* § 28(a) of the 1934 Act.

Each case cited by Chris-Craft (Brief 46, 50-53) and the SEC (Brief 112-16, 122) in support of standing supports the contrary proposition—that the Williams Act was enacted to protect shareholders, not to bestow any rights on contestants.[7] None of the decisions under § 14(e), with

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[6] The SEC, in contrast to the court below (A30), correctly states that Chris-Craft as a disappointed competitor would have no cause of action at common law on account of the acts it complains of here (SEC Brief 44-47; *see also* First Boston Brief 25-26 n.9).

[7] *See, e. g., Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 58, 60:

> "The Congress expressly disclaimed an intention to provide a weapon for management . . . ."
>
> * * *
>
> "[T]he principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer . . . ."

Sargent v. *Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974):

> "The evil to be remedied [by the Williams Act] was inadequate disclosure to tendering security holders. Congress made it clear that the investor protection sought by 14(e) was disclosure to those who had to make the hold or sell decision."

H. K. Porter Co. v. *Nicholson File Co.*, 482 F.2d 421, 423-24 (1st Cir. 1973):

> "Little in the legislative history [of the Williams Act] suggests that Congress was motivated by concern for the plight of frustrated tender offerors or, for that matter, the incumbent management of the target."
>
> * * *
>
> "From the statutory scheme and the legislative history, it seems clear that the overriding purpose of § 14(e) is the protection of the investor."

the single and very limited exception of *H. K. Porter Co.* v. *Nicholson File Co.*, (see note 7, *supra*, and our main brief at 24, 29), has granted a contestant for control the right to sue for damages. Nor have any of the decisions under the allegedly analogous proxy rules (Chris-Craft Brief 40-41; SEC Brief 107-112) allowed such actions.[8]

To be sure, contestants for control have been permitted to sue under § 14(e) for corrective *injunctive* relief during the course of a contest, because such relief benefits the shareholders themselves and supplements the SEC's enforcement of statutory obligations for the shareholders' benefit.[9] In contrast, a damage action by a corporate contestant in no way benefits the public investors intended to be protected by the securities laws. This crucial distinction is said by Chris-Craft (Brief 58-59) and the SEC (Brief 139 n.342 § 3) to have been rejected in *Borak*,

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[8] The proxy analogy is far overdrawn. Though both can affect corporate control, proxies and tender offers have "obvious differences," *see Senate Hearings* 35; *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 945-46 (2d Cir. 1969), and the "closest analogy" to the Williams Act in prior law was the regulation of exchange offers, where only shareholder-purchasers could sue. *Senate Hearings* 138; *see* SENATE REPORT 2-3; *Senate Hearings* 201. The concern of the Williams Act, as with § 10(b), is primarily with a decision to buy or sell at a given price. *See Senate Hearings* 34-35; *see also id.* at 118, 126, 131, 140-41, 143. The concern of the proxy rules, on the other hand, is corporate suffrage—the right of the shareholder to cast an informed vote. *See TSC Industries* v. *Northway, Inc.*, 96 S. Ct. 2126 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *See also* page 11 & n.15, *infra*.

[9] Chris-Craft relies heavily on *GAF Corp.* v. *Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972), to support its claim for damages. The case is to the contrary:

> "We should not be wooden or rigid in granting the right to the issuer seeking equitable or prophylactic relief—*not monetary damages*—to take the necessary steps to effectuate the purposes of section 13(d) [of the Williams Act]."

453 F.2d at 720 n.22 (emphasis added). *See also Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d at 947; *Ronson Corp.* v. *Liquifin A.G.*, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,369 at 95,248 & n.7 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir. 1974).

but *Borak* dealt only with the relief to be afforded at the instance of, and for the direct benefit of, shareholders.[10]

B. First Boston's additional point that actions complaining of a 1933 Act registration statement should be limited to those expressly provided by Congress in §§ 11 and 12(2) of that act is answered neither by Chris-Craft nor by the SEC.

The SEC does acknowledge (Brief 155-56 & n.365) that § 11's limitation of damage liability should be given effect in its proposed actions on registration statements under § 14(e), but ignores the other important limitation prescribed by § 11—the restriction of any claim for damages to purchasers of the registered securities.[11] Nothing in the language or legislative history of § 14(e) indicates a congressional intent to repeal this limitation by implication in the case of registration statements that happen to pertain to exchange offers.[12]

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[10] Courts have recognized that the "primary contribution of the Williams Act to the antifraud arsenal" is to provide a shareholder standing "whether or not he has tendered his shares." *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *see Senate Hearings* 35. Judge Friendly's language in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d at 940-41, as to the "bearing" § 14(e) "may have on the issue of standing" refers to the point made in *Smallwood*, not to recovery of damages by contestants for control.

[11] This restriction has been most strictly construed and applied, *Barnes* v. *Osofsky*, 373 F.2d 269 (2d Cir. 1967), and the SEC's failure to take account of it is surprising in view of this Court's recognition in *Blue Chip Stamps* that it "would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736.

[12] As noted in our main brief at pages 32-33, the Williams Act was intended to protect shareholders faced with cash tender offers. Congress recognized that exchange offers were already adequately covered by § 11, and they were included within the literal scope of § 14(e) only in order to regulate communications opposing them.

Moreover, § 14(e) says nothing about underwriters, and for purposes of liability on a registration statement an underwriter is solely a creature of § 11, which imposes specified obligations upon him for the benefit of a specified class *and no one else.*

The SEC, like the Court of Appeals, regards § 14(e) as having invisibly incorporated and extended the § 11 obligations of a § 11 underwriter to a new, undefined and apparently unlimited class (SEC Brief 156-57 n.365; *see* A55). As Judge Mansfield observed (A117), Congress "would be startled to find" that it, or more accurately the courts, had accomplished such a result.[13]

C. Finally, Chris-Craft complains that First Boston's "one-sided view" toward standing would create "jungle warfare." Rather, were losing contestants permitted to sue on the hypothetical deception of shareholders of another company, the result would be a jungle of speculative litigation. Congress certainly did not intend § 14(e) to give rise to such controversies in the abstract and they should not be permitted by judicial implication.

II. Scienter

A. Chris-Craft and the SEC argue in passing that scienter, i.e., an "intent to deceive, manipulate, or defraud," *see Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1381,

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[13] Nor does *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951), which is relied upon by both Chris-Craft (Brief 103-04) and the SEC (Brief 152-54), support the extension of § 11 duties beyond § 11's bounds. *Fischman* did permit an action challenging a prospectus to be maintained under § 10(b) of the 1934 Act, but only upon a claim of *fraud*, not negligence in respect of a § 11 duty. Even that limited holding is without support in this Court's decisions. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. at 752 n.15. *See also* 6 L. Loss, Securities Regulation 3912 (Supp. 1969).

is not required for damage liability under § 14(e) by reason of its language and legislative history (Chris-Craft Brief 69-72) (SEC Brief 154-55 n.364).

The language of § 14(e) is virtually identical to that of Rule 10b-5, and the lower courts have unanimously found the 10b-5 scienter requirement equally applicable to § 14(e), as pointed out in our main brief at pages 34-35.

The references in the legislative history cited by Chris-Craft (Brief 70-71) and the SEC (Brief 154 n.354) do not suggest that intent to defraud is unnecessary for liability under § 14(e); rather, they are general discussions of the Williams Act *as a whole*, with its various affirmative notice, disclosure, and filing requirements (*e.g.*, §§ 13(d), 13(e), 14(d) of the 1934 Act) (*see* note 8, *supra*). All specific references to § 14(e) in the legislative history analogize it to Rule 10b-5 and characterize it as the "anti-fraud" or "fraudulent transactions" provision of the Williams Act.[14] Indeed, in the course of its argument, the SEC acknowledges that § 10(b) and anti-fraud precedents are the source of § 14(e).[15]

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[14] *E.g.*, SENATE REPORT 10; HOUSE REPORT 11; *Senate Hearings* 131, 140-41, 143. In the legislative history of the 1970 Amendments to the Williams Act, Congress and the SEC repeatedly described § 14(e) as proscribing "fraudulent activities." *E.g.*, S. REP. No. 91-1125, 91st Cong., 2d Sess. 2 (1970); H. REP. No. 91-1655, 91st Cong., 2d Sess. 2, 7 (1970); *Hearing on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 8, 35, 116 (1970); 116 Cong. Rec. 29251 (Aug. 18, 1970). *Accord*, 6 L. Loss, SECURITIES REGULATION 3660-61 (Supp. 1969).

[15] SEC Brief 17, 64-65 & n.159, 154-55 n.364. At 154-55 n.364, the SEC states that "the relevant portion of Section 14(e) is substantially identical to Rule 14a-9," implying that § 14(e) was modeled on Rule 14a-9 under § 14(a) of the 1934 Act. In fact, § 14(e) is "substantially identical" to Rule 10b-5 and does not follow either § 14(a) or Rule 14a-9, which, as Judge Friendly pointed out in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 & n.17 (2d Cir. 1973), lack the "evil-sounding language" of §§ 10(b) and 14(e).

Further, the fact that the language of Rule 10b-5(2), pertaining to material misstatements and omissions, was incorporated into § 14(e) itself, rather than a subsidiary regulation, is of no significance (see First Boston Brief 35 n.16). Congress patterned § 14(e) on Rule 10b-5 with full knowledge that the courts had construed § 10(b) and Rule 10b-5 as "anti-fraud" provisions, and enacted § 14(e) as a "fraudulent transactions" provision. The question whether the language of Rule 10b-5(2) "viewed in isolation . . . could be read" to proscribe unintentional but wrongful conduct is, therefore, as irrelevant to this case as it was to *Ernst & Ernst* (*see* 96 S. Ct. at 1390).

B. In order to afford a grudging measure of recognition to Congress' express limitations of an underwriter's liability in § 11, the SEC proposes a bizarre dual culpability test of its own devising. The SEC would limit an underwriter's liability under § 14(e) to the maximum amount permitted by § 11 if only negligence were found, but provide unlimited liability if something more were proven (SEC Brief 152, 156-57 & n.365, 159). There are two basic errors inherent in this approach: (1) it proceeds on the wrong assumption that intent to defraud is not required for damage liability in any amount under § 14(e), and (2) it mistakenly attempts to incorporate the § 11 underwriter's duty into § 14(e), making § 11 meaningless as to registered exchange offers. *Fischman* v. *Raytheon Mfg. Co.*, relied upon by the SEC, did not adopt § 11 standards under § 10(b) and in fact required proof of fraud in such cases (*see* note 13, *supra*).

The significance of the SEC's discussion lies in its acknowledgment that the Court of Appeals was mistaken in holding First Boston to have been anything more than

negligent, even in terms of "its independent duty as an underwriter" (SEC Brief 156-57 & n.365). The SEC suggests a remand to the District Court to reconsider that question, but, aside from the basic error of viewing § 14(e) liability in terms of a § 11 duty, such a remand is unnecessary.

The District Court has already considered First Boston's conduct and has found, on the evidence, that First Boston acted "in good faith" and did not engage in "any course of conduct which operated as fraud or deceit upon Chris-Craft *or* the public shareholders of Piper." Indeed, the District Court said that "were the record to support" Chris-Craft's claims against the other defendants, "the Court would be hard put to find *any basis*" for imposing liability on First Boston. (A158; emphasis added). As to the tendering Piper shareholders, First Boston was an underwriter; hence, the District Court has already found First Boston free from culpability in terms of "its independent duty as an underwriter," as well as otherwise.[16]

C. Though the SEC in effect concedes that First Boston is not liable under the scienter standard established by *Ernst & Ernst*, Chris-Craft persists in its Alice-in-Wonderland portrayal of the BAR omission as an intentional "fraud" of "devastating impact" (Chris-Craft Brief 20, 22).

Chris-Craft would have evil intent *presumed* from a later finding of materiality. Its thesis is that if one prepar-

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[16] Chris-Craft's insinuation (Brief 75) that First Boston decided "to remain silent" about the BAR on grounds of a claimed "professional privilege" and by reason of a policy of "loyalty to clients" is false and without basis in the record or in any submission of counsel.

ing a complicated and lengthy prospectus knows something and does not include it, he *ipso facto* had an intent to deceive or defraud, or was guilty of "reckless disregard for the truth" (Chris-Craft Brief 64-69). This ignores the fact that reasonable men may and do differ, and does not accept the necessity for the exercise of *judgment* by those carrying out difficult professional tasks in a complex commercial society.

The District Court's findings of "good faith," based on a careful assessment of all the evidence by a highly experienced trial judge,[17] absolutely preclude a determination of culpability under *Ernst & Ernst*.[18]

Moreover, were it at all relevant to the issues before the Court, we would show at length that First Boston's conduct was free even of negligence. Merely by way of further summary of the BAR matter, which is discussed in our main brief at pages 9-11 and 38-40, we note that the BAR was never "overvalued" as Chris-Craft claims, nor was there a "loss" on the BAR undisclosed to the public.

Carrying values on balance sheets do not normally represent realizable market values for any fixed asset, and Bangor Punta's use of estimated 1965 market value as the book value of the BAR was a conservative accounting treatment as that amount was 40% below the historic cost basis (D4). There was no representation in the prospectus,

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[17] Judges Mansfield and Gurfein observed that, in Judge Mansfield's words, the District Court's findings as to the BAR were based on "extensive proof . . . including the testimony of key witnesses who were personally observed and whose credibility was appraised by Judge Pollack, whose experience in the field of securities litigation at least matches if not exceeds that of this panel" (A118, *see* A98).

[18] *See generally* Note, *Section 11 and Underwriter Liability: A Case of Statutory Misconstruction*, 7 RUTGERS-CAMDEN L.J. 741, 752-53 (1976).

explicit or implicit, that estimated *1965* market value was *1969* market value, and the BAR's steadily declining post-1965 earnings record was fully set forth in the prospectus.

Likewise, there was no "loss," even an accounting loss, on the BAR until it was later sold. At the time of the exchange offer, a sale was not "a reasonable probability" (D13) and the board had ordered a lengthy study of the question; alternate approaches that might have effectively realized an additional $9 million were then under consideration and continued to be strongly espoused by some members of the board for months thereafter, until three days before the actual sale (D6-12). Even upon the sale, the only "loss" was a book loss, not a cash loss. Thus, while the shareholders' book equity declined by 12%, the sale was recognized in the financial community as improving Bangor Punta's prospects, and its shares increased in market price.[19]

Finally, Chris-Craft's suggestion (Brief 20-21, 77) that First Boston was somehow derelict or deceptive vis-a-vis the Piper shareholders in its "appraisal" of the Bangor Punta offer is factually distorted and disingenuous. First Boston of course knew of the possibility that the BAR could be sold at a book loss; First Boston also knew of the BAR's current insignificance and potential detriment to Bangor Punta's earnings (as disclosed in the prospectus, EV 47). Further, First Boston knew that a sale, if it occurred, would improve Bangor Punta's earnings prospects, the principal factor in valuing a going concern. First Boston's judgment took all this into account

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[19] In sum, the effect of a possible sale of the BAR was not of such significance as to provide even persons prepared to act in bad faith a motive for concealment, assuming there was something to conceal. Likewise, in contemplation and actuality the sale was positive, or at least immaterial, to the value of Bangor Punta's securities.

and was vindicated promptly by the market itself (A140), again when the market rose following the BAR sale, and finally by the total lack of any complaint from any tendering shareholder.[20]

First Boston acted in good faith and breached no duty to anyone.

III. Causation

The SEC contends that the Court of Appeals properly applied its "*Mills-Ute* test" of presumed causation to establish "liability," but agrees that causation of "damages" cannot be so presumed and refuses to address whether damages in this case were proved (SEC Brief 145-48, 161-62 & n.370). It is unclear whether the SEC regards injury-in-fact as encompassed within "liability" or "damages," but it is injury-in-fact to Chris-Craft, not "liability" *in vacuo*, that gives rise to the basic causation issue in this case.[21]

Mills announced a rule of law equating violation by corporate fiduciaries of the disclosure requirements of the proxy rules with legal injury to shareholders and, hence, with liability in a private action *by such shareholders*. If *Mills* has any direct application outside the shareholder-proxy context, which is questionable, it provides absolutely no basis for erecting a legal presumption of injury

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[20] First Boston was, in reality, not an "appraiser" at all and rendered no opinion on value to the public shareholders of Piper; First Boston did render to the Piper family, as required by their contract with Bangor Punta, its opinion that the package Bangor Punta proposed to offer to Piper's public shareholders had a market value of $80 per Piper share.

[21] There is, of course, a question of damage causation raised by the compensation of Chris-Craft for market loss.

to one party by reason of an allegedly material omission in a statement made to someone else.[22]

Chris-Craft both relies on the Court of Appeals' erroneous presumption and asks this Court to find causation by factual inferences (Chris-Craft Brief 82). The District Court, which considered and made findings on causation as a factual matter, found that the evidence did not justify any such inference (A145-46). Those findings are clearly correct and were unquestioned by the Court of Appeals, which felt compelled by its "*Mills-Ute* test" to *presume* injury (A59-60).

Since injury, *i.e.*, compensable loss proximately caused by the defendant, is an essential element in establishing liability in a civil action for money damages and was not proved by Chris-Craft, reversal is required on this ground alone.

IV. Relief

We note only the following as to relief, which is fully discussed at pages 46-55 of our main brief:

The SEC now agrees that the rescission offer decreed at its instance may have fully remedied any injury done to anyone by the BAR omission (SEC Brief 149-50 n.359). Certainly that is so as to Chris-Craft, which bases its claim on a derivative presumption of injury. Therefore, no damages should be awarded.

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[22] *See generally* Note, *Chris-Craft: The Uncertain Evolution of Section 14(e)*, 76 COLUM. L. REV. 634, 655-57 (1976). Even *Ute* did not rely on *Mills* to postulate injury, but to find reliance in a situation where a factual inference of reliance by the plaintiffs was virtually inescapable and their injury was indisputable.

The Solicitor General in his statement appended to the SEC's brief calls to the Court's attention the earlier expressed view of the United States that the Court of Appeals took "an incorrect approach in measuring damages" (SEC Brief 198). The SEC agrees on the limitation of First Boston's liability, as noted above, and tacitly concedes the broader proposition (SEC Brief 161 n.370).

V. Summary

Error pervaded every aspect of the decision below. The law was improperly construed and applied on questions of culpability, causation and damages. The Court of Appeals' analysis and understanding of the character of First Boston's conduct as to the Bangor Punta registration statement were particularly askew, both factually and legally.

The basic inapplicability to this type of litigation of rules developed by the courts to protect defrauded or misled investors is itself grounds for denying the judicial implication of a cause of action for damages here. When litigation is focused on theoretical deceit, unconnected to any loss by the allegedly deceived, a predictable result is confusion and arbitrary decision. Such litigation puts honest businessmen in peril of their property and reputations, encourages certain businessmen to view the judicial process as a new area of diversification, and materially interferes with the functioning of capital markets. Congress never intended to foster litigation of this nature, and it is devoid of social utility.

A full examination of all aspects of this case confirms that § 14(e) should not be construed to afford a cause of action for damages to contestants for control, and certainly not a cause of action against an underwriter of a rival exchange offer.

Conclusion

For the reasons stated herein and in our main brief, the judgment should be reversed and the complaint dismissed.

Respectfully submitted,

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